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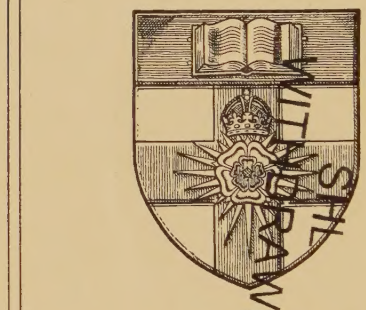

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PREFACE

THIS is the fourteenth volume of *Current Legal Problems*. It contains, together with The Hon. Mr. Justice Salmon's Presidential Address to the Bentham Club, the public lectures which were delivered in the Faculty of Laws of University College, London, during the Session 1960–61.

We wish to thank the contributors, publishers and printers for their co-operation in securing the speedy production of this Volume, and our colleague, Dr. B. Cheng, for his work as Assistant Editor.

THE EDITORS

UNIVERSITY COLLEGE, LONDON,
April 1961.

THE CRIMINAL LAW RELATING TO INTENT

The Hon. Sir Cyril Salmon

In a society emerging from comparatively primitive conditions, the preservation of order is the matter of paramount importance and one of great difficulty. For this reason the doctrine of absolute liability usually prevails, that is to say the law, in meting out punishment, looks only at what a man does and is in no way concerned with his attitude of mind. So it was in this country until the thirteenth century, when the idea that criminal guilt should depend upon moral blame was born.[1]

Mens Rea

This idea begot the great common law principle that a guilty mind is an essential element in criminal responsibility, a principle which developed slowly, fitfully and with difficulty but which now has long been firmly established. To this principle there are, of course, many statutory exceptions the moral justification for which is admirably expressed by Dean Roscoe Pound. "Such statutes," he says, "are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals."[2] The offences created by such statutes are not regarded by the public as serious crime. What, however, is the mental element that is a necessary ingredient of serious crime and that we generally call *mens rea*, or, in murder, malice aforethought, and how is it ascertained? As a rule it is the intention with which the allegedly criminal act is committed.

Intention is a matter of fact—to be ascertained like all facts in a criminal trial by the application of the jury's common sense to the available evidence. No doubt there are practical tests that can help

[1] F. Pollock and F. W. Maitland, *The History of English Law* (2nd ed., 1898), Vol. II, p. 468 *et seq.*

[2] *The Spirit of the Common Law* (1921), p. 52.

the jury in their task. I doubt, however, whether there can be any rule of law that is any more useful for ascertaining the state of a man's mind than the state of his digestion, for each equally is essentially a matter of pure fact. Nor is a jury helped by a disquisition on the true nature of intention or the natural and probable consequences of an act. These matters are more in the realm of metaphysics than of law and, apart from being of doubtful practical value, are beyond the grasp of the average juryman.

It is often difficult to discover a man's true intention: "For it is common knowledge that a man's mind will not be probed: for the devil himself does not know man's intention," as Brian C.J. observed as long ago as the reign of Edward IV.[3] On the other hand, Bowen L.J. has referred to "the fallacious use . . . of the principle that you cannot look into a man's mind" and stated: "So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud."[4]

Although the task of discovering the state of a man's mind may appear daunting, it is a task that juries usually perform satisfactorily. Indeed, I have never known a jury in appropriate circumstances shrink from a finding that the accused had the necessary intent to make him guilty of the crime charged, whether it were murder, fraud or any other criminal offence.

The Objective Test

How is this task performed? Nothing as yet has been invented, perhaps fortunately, that can look into our minds and record our thoughts. Accordingly, the only evidence of intent that can be adduced by the prosecution is necessarily objective. The prosecution can only prove what the accused did and the circumstances in which he did it, and invite the jury to draw the inference that he must have intended the natural and probable consequences of his acts. Until comparatively modern times an accused person was

[3] Y.B. 17 Ed. IV, p. 2.
[4] *Angus* v. *Clifford* [1891] 2 Ch. 449, at p. 471.

unable to go into the witness-box to give evidence on oath. Accordingly, apart from confessions, there never was any evidence of intent before the court except objective evidence. The rule that a man is presumed to intend the natural and probable consequences of his act, which is obviously of sound common sense, started life as a rule of evidence for ascertaining the intention of the accused but tended to harden into a rule of law.

The Subjective Test

Ever since accused persons have been allowed to give evidence on their own behalf, they have often gone into the witness-box and said on oath that they had no intention to commit any criminal act. Often they are disbelieved by the jury but sometimes they are believed or their evidence creates a doubt in the jury's mind as to whether they had the intention that otherwise their acts might seem to establish. For many kinds of crime, for example, those involving an intention to defraud, the real question for the jury is today, and always has been, purely subjective: "Did this man intend to defraud?" and not: "Would any reasonable or ordinary responsible man doing what the accused did in all the circumstances of the case have intended to defraud?" The jury certainly consider the second question, and the answer to it is no doubt very useful in arriving at the true answer to the first. But it is the answer to the first question upon which the verdict depends.

Intent in the Case of Murder

Until recently it had been widely but wrongly supposed that the same principle held good in the case of murder. The question for the jury was: "Did the accused kill intending to kill or to do grievous bodily harm?" Most people considered it just that a man who killed with this intention should be held guilty of murder. Some people, on the other hand, thought that the law should be amended so that the relevant question should be: "Did the accused kill intending to kill or do an act which he knew was likely to cause death?" There was something to be said for this latter view

when we were hag-ridden by the old authorities [5, 6] which, in effect, defined grievous bodily harm as any serious interference (not necessarily dangerous or permanent) with the health or comfort of the deceased. It was then possible, as Devlin L.J. once pointed out,[7] for a man to be convicted of murder by pinprick. If by way of a bad joke A stuck a pin into B's buttock he must have intended seriously to interfere with his comfort. If B then turned out to be a haemophiliac or if blood poisoning by mischance supervened, and as a result B died, then A would have been guilty of murder.

The House of Lords have, however, recently set the law free from the old authorities to which I have referred, and decided that there is no justification for treating the expression "grievous bodily harm" as bearing any other than its ordinary and natural meaning, that is to say "really serious harm." This beneficent decision in *Director of Public Prosecutions* v. *Smith*,[8] which is of far-reaching importance, seems to have been overlooked in the general interest aroused by the main decision in that case. Surely any sane man must know that if he injures another, intending to do him really serious harm, there is at any rate a danger that death may result. In these circumstances, is it unjust that if A injures B with the deliberate intention of doing him really serious harm, A should be guilty of murder if as a result B dies?

Stephen J., in his *Digest of The Criminal Law*, defines the state of mind necessary to render an accused guilty of murder as:

> "(a) an intention to cause the death of or grievous bodily harm to any person . . .
>
> "(b) knowledge that the act . . . which causes death will probably cause the death of or grievous bodily harm to some person . . . although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."

The two other categories of murder referred to by Stephen J. relating to causing death whilst committing a felony or whilst

[5] *R.* v. *Ashman* (1858) 1 F. & F. 88.
[6] *R.* v. *Cox* (1818) Russ. & Ry. 362.
[7] [1954] Crim.L.R., p. 669.
[8] [1960] 3 W.L.R. 546.

resisting arrest have been swept away by the Homicide Act, 1957. The Royal Commission reporting on Capital Punishment in 1953 expressly rejected what was then put forward as a theory, namely, " that it is not necessary that the accused shall actually have foreseen the consequences if he was aware of the circumstances that, according to common experience, would make the commission of the act likely to involve great danger." They stated:

> " under the existing law the question the jury have to consider . . . is whether accused knew or was aware of the likely consequences of his act: we think the present law is sound."

A Matter of Inference

Prior to the decision of the House of Lords in *Director of Public Prosecutions* v. *Smith* the judges commonly summed up in cases of murder on the basis that the law relating to intent was as stated by Stephen J. and accepted by the Royal Commission. The test was subjective: " What did the accused intend? What did he contemplate? " The jury were sometimes reminded of the presumption that a man intends the natural and probable consequences of his acts but the jury were never directed that this presumption was irrebuttable except by proof of insanity or the like. Sometimes it was suggested to the jury that they should test the truth of the accused's evidence by considering what any ordinary man doing what the accused did would have realised, but it was never suggested to the jury that this was an absolute criterion. They were told that if they believed the accused's evidence relating to his intention, or if this evidence raised a reasonable doubt in their minds about his intention, he was entitled to be acquitted. The emphasis put upon the importance of the presumption or the test to which I have referred varied from case to case. In many cases the inference to be drawn from the accused's acts was so strong that when he said that he really intended no serious harm, his evidence put a strain on the credulity of the jury that it was wholly unable to bear.

No doubt the learned trial judge in *Smith's* case put the strong emphasis on the presumption which the facts of that case clearly

called for, but in his characteristically lucid summing-up he followed the common practice. He summed up on the basis that the crucial question for the jury was: Did the accused intend really serious harm to the deceased? The learned judge said:

> "The intention with which a man did something can *usually* be determined only by inference from the surrounding circumstances including the presumption that a man intends the natural and probable consequences of his acts."

And after referring to the facts, he said:

> "Could any reasonable person fail to appreciate that the likely result would be at least serious harm to the officer? If you answer that question by saying that the reasonable person would certainly appreciate that, then you *may* infer that that was the accused's intention. . . ."

And again:

> "If the reasonable man would realise that the effect of doing that might well be to cause harm to the officer . . . *you would be entitled* to impute such an intent to the accused and therefore to sum up the matter as between murder and manslaughter if you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result . . . then the accused is guilty of capital murder."

It seems to me that the last few words, read in their context, mean: "If you disbelieve the accused and are satisfied in spite of what he said that he must have realised that the police constable was likely to suffer serious injury then he is guilty of capital murder."

I do not think that the facts of this case are of any particular importance to the matter we are discussing, but if the jury believed the prosecution's evidence, it is difficult to see how they could have come to any conclusion other than that the accused must have realised the danger of serious injury to the police constable. If any sane man, with traffic coming towards him and a policeman hanging on to his car, drives in a zig-zag fashion in order to shake the policeman off into the road, he must surely know that as a

result of his conduct there is at least a real danger that the policeman will suffer really serious injury. He may push that knowledge into the back of his mind, he may hope that no serious injury will result, but if he deliberately does the act knowing the likely results, it seems to me difficult to say that he did not intend those results. We must not confuse intention with hope or motive. His motive was no doubt to escape arrest. It was so strong that he intentionally did an act which he knew was likely to cause serious injury, although he hoped that it would not do so. This case would exactly fit Stephen J.'s second category to which I have referred.

It does not seem to me to be practical to expect a jury to inquire into whether a man appreciated that a result of his actions was certain rather than likely. Often an almost imperceptibly fine line divides the certain from the likely. A jury have to be satisfied beyond reasonable doubt; they could hardly be so satisfied that a man knew it was certain, rather than likely, that really serious harm would follow his act. Besides, is there much difference in moral blame between a man who does an act knowing it is certain to cause serious harm and one who does the act knowing it is likely to cause serious harm?

When *Smith's* case came to the Court of Criminal Appeal, that court, in its anxiety to preserve the principle that the accused's guilt depends ultimately upon his state of mind, quashed the conviction for murder and substituted one of manslaughter, holding that the learned judge should have explained to the jury in express terms that the presumption to which he had alluded was valuable only for ascertaining the accused's state of mind, and would be rebutted if they believed the accused's evidence. This, however, seems to me implicit in the summing-up.

The irony of the situation is that as a result of what may have been the Court of Criminal Appeal's excessive zeal to preserve the subjective test in its purest form, the case was taken to the House of Lords where the subjective test in any form was utterly rejected. The House of Lords stated:

> "It matters not what the accused in fact contemplated as the probable result [of his acts] or whether he ever contemplated at all."

They proclaimed that an objective test (the nature of which I will presently consider) was the sole criterion upon which the verdict of the jury should depend. It is certainly no exaggeration to say that this decision of the House of Lords has caused considerable interest both amongst lawyers and the general public.

Critics of Smith's Case

No one can doubt what the law is, for it has been stated by the House of Lords. But there is a considerable body of opinion in favour of the view that the law so stated should be changed by statute so that no one without a guilty mind can be found guilty of murder. Those in favour of reform argue that criminal responsibility for murder should depend, not upon what the reasonable person would have contemplated, but upon what the accused in fact contemplated, and they suggest that the law should be reformed in order to keep it in touch with common morality. Our jurisprudence owes much to those who have taught and written about the law—not least to Jeremy Bentham himself. It is impossible to shrug off criticisms of the law on the ground that they come mostly from what people who do not agree with them sometimes describe as mere academic lawyers and theoretical jurists. Nor is it in the least relevant that probably on any view of what the law is or should be Smith was guilty. It is equally silly to discount the views of those whose lot it is to administer or practise the law, on the ground that they are so busy that they have no time to study or understand it; for their business is the law. Whatever views have been expressed should be considered on their merits irrespective from whence they come, although no doubt there is a stronger prima facie presumption in favour of some individual sources than others. Nor can it be assumed that in any controversy which may have arisen over *Smith's* case, only the academic lawyers are ranged on one side and the practising lawyers on the other. It must not be forgotten that the House of Lords' decision reversed a judgment of the Court of Criminal Appeal and that that judgment was delivered by Byrne J., one of the ablest and most experienced criminal lawyers of his generation.

The Test Adopted in Smith's Case

As I have already suggested, the Court of Criminal Appeal in *Smith's* case differed from the trial judge, not on the ground that he had rejected the subjective test, but on the ground that he had not sufficiently explained to the jury that in deciding what the accused intended, the presumption of fact that he intended the natural and probable consequences of his acts was rebuttable. The House of Lords decided that what the accused contemplated was irrelevant and that the objective test finally decided the question of guilt. It has been assumed that the objective test laid down by the House of Lords is: "What would a man of reasonable prudence have foreseen when doing the act done by the accused."

If (which is very doubtful) this is what the House of Lords decided, then it may be that a strong case can be made out that Parliament should reform the law. Postulating facts similar but not as strong against the accused as those in *Smith's* case, one can imagine that a jury, after having retired for some time, might come back into court and ask for further directions from the judge. They might say: "We are satisfied that a man of reasonable prudence would have foreseen a real danger to the deceased, but we are equally satisfied that the accused, because he has not quite the foresight, prudence and common sense of the average man, had no idea that his acts would cause any injury to the deceased, and that if he had had any such idea he would not have acted as he did. Are we to find him guilty or not guilty of capital murder?" If the objective test really is "What would a man of reasonable prudence have foreseen?" it seems that the answer of the judge should be: "You must find him guilty." The accused would be guilty of the same crime and the same sentence would be imposed upon him as upon the man who intends to kill or to cause really serious bodily injury. The only nexus between the two is that each has caused a death. The moral blame in the one case is in a different class from that in the other.

No doubt such cases would be rare indeed, for the vast majority of accused do foresee the natural and probable consequences of their acts. But who would be sanguine enough to say that in the course

of years a significant number of such cases may not occur? For the law in such circumstances to require a man to be convicted of capital murder and condemned to death would surely shock the public conscience. It would be no answer to say that the accused would never be hanged, that such cases are rare indeed or that juries can be relied on to do broad justice whatever directions they receive. The only convincing answer would be that Public Safety requires that a possible injustice in a very small percentage of cases should be accepted because juries cannot be trusted to apply the subjective test, a contention which many believe to be contrary to common experience. Moreover, if the true objective test of the accused's guilt depends upon what the man of reasonable prudence would have foreseen, why should a man have a good defence to a charge of murder on the ground that when he killed, he had made himself so drunk as to be incapable of forming any intent? There is no doubt that such a degree of drunkenness is a complete defence to a charge of murder.[9] Why should drunkenness, for which a man is himself to blame, operate as a defence but lack of ordinary prudence be of no avail?

The view that the objective test laid down by the House of Lords is "What would a man of reasonable prudence have foreseen?" gains some support from the fact that the first authority cited with approval by the House of Lords is a passage from a book by Oliver Wendell Holmes,[10] *The Common Law*, which states: "The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen."

A Qualified Objective Test?

On the other hand, the House of Lords also cited with approval the following passage in Lord Goddard C.J.'s judgment in *R.* v. *Ward*[11]:

> "But if the jury come to the conclusion that any reasonable person, that is to say a person who cannot set up a plea of

[9] *D. P. P.* v. *Beard* [1920] A.C. 479.
[10] *The Common Law* (1887), p. 54.
[11] [1956] 1 Q.B. 351.

> insanity, must have known that what he was doing would cause at least grievous bodily harm, then that amounts to murder in law."

There is considerable difference between any sane man and any man of reasonable prudence, for there are many persons who to some extent lack reasonable prudence and yet are sane; many sane men might not foresee what a man of reasonable prudence would foresee. Accordingly, if the question for the jury is: "Are you satisfied beyond a reasonable doubt that any man of reasonable prudence must have known that what he was doing was likely to cause grievous bodily harm?" the verdict may be quite different from what it would be if the question is: "Are you satisfied beyond reasonable doubt that any sane man must have known that what he was doing was likely to cause grievous bodily harm?"

The view that the House of Lords intended to lay down the latter test gains support not only from the citation of Lord Goddard's judgment in *R.* v. *Ward*,[12] but also from the observations in the Lord Chancellor's speech that "the only available test (for what is the natural and probable result of an act) is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result." The Lord Chancellor, in referring to the ordinary responsible man, states that he does not mean the man on the Clapham omnibus, *i.e.*, the mythical man of reasonable prudence, but the man "in law responsible and accountable for his actions, that is . . . a man capable of forming an intent not insane within the M'Naghten Rules and not suffering from diminished responsibility."[13] Again he says that "the only thing that could rebut the presumption (that the accused intended the natural and probable result of his act) would be proof of incapacity to form an intent, insanity or diminished responsibility."[14]

Let us consider some future case in which such a man accused of murder says in the witness-box that he had no intention to kill or do serious harm and that he never contemplated for a moment

[12] *Ibid.* at p. 356.
[13] *Loc. cit.*, note 8, above, at p. 554.
[14] *Ibid.* at p. 557.

that any serious harm could result from his acts. Might not an ingenious advocate for the defence address this argument with some success to the jury: "If you believe the accused, how can you be satisfied that any man of ordinary responsibility as defined by my Lord must have foreseen the result of these acts? For if you believe the accused, here is a man admittedly of ordinary responsibility who did not foresee the result." Accordingly, if the test is what would a man of ordinary responsibility have foreseen and not what would the man of reasonable prudence have foreseen, it may well be that the jury will still have to consider what the accused intended in reaching their verdict. This would mean that the objective test laid down by the law imposes a somewhat circuitous method of arriving at a verdict but not one which could work any injustice.

A Seed of Doubt

Is the suggested argument ruled out by the words "it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all"? This must depend upon whether the House of Lords intended this passage to be read literally and without qualification. The normal rule of evidence is that no irrelevant testimony is admissible. Is a man on trial for murder, who elects to give evidence, not entitled to tell the jury when he goes into the witness-box that he had no intention to kill or to do serious harm and indeed that he had no idea that his acts would cause any serious harm? If he is entitled to give this evidence, is the duty of the judge to tell the jury to pay no attention to it as it has nothing to do with what they have to decide? Clearly, if A kills B in such circumstances that no ordinary responsible man doing what A did could be thought to have intended B serious harm, yet A makes a statement confessing that he in fact intended to kill B or do him really serious harm, such a statement is admissible against A and, if believed, would convict him. May a jury for the purpose of convicting consider a statement made to the police by the accused about his intention, but for the purpose of acquitting be debarred from considering the sworn evidence of the accused about his intention?

It is quite plain that the House of Lords laid down the proper direction to be given to juries not only in the case of murder but also in cases of the statutory offence of wounding with intent to do grievous bodily harm.[15] The offence created by the legislature appears to be stated in clear and unambiguous terms. In *R.* v. *Steane*[16] Lord Goddard C.J. said:

> "To take a simple illustration, a man is charged with wounding with intent to do grievous bodily harm. It is proved that he did severely wound the prosecutor. Nevertheless, unless the Crown can prove that the intent was to do the prosecutor grievous bodily harm, he cannot be convicted of that felony. It is always open to the jury to negative by their verdict the intent and to convict only of the misdemeanour of unlawful wounding. . . . No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may . . . find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if . . . they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted."

This was no doubt a special case dealing with broadcasting in an enemy country with intent to assist the enemy, but the principle enunciated by Lord Goddard was evidently not then intended to be restricted to such cases.

But now this principle no longer holds good in cases of murder or wounding with intent to do grievous bodily harm. The accused is guilty of the statutory offence if he wounds in such circumstances that the ordinary responsible man inflicting such a wound must have realised that grievous bodily harm was likely to result. What is the proper direction to be given to the jury when the accused is indicted in count (1) for wounding with intent to murder, and

[15] Offences against the Person Act, 1861, s. 18.
[16] [1947] K.B. 997, at p. 1004.

alternatively in count (2) for wounding with intent to do grievous bodily harm? Unless the House of Lords has by inference overruled the existing authorities, a man cannot be convicted of wounding with intent to murder unless his attitude of mind was such that he intended to kill.[17] Is the jury to be told that in considering intent to murder under count (1) it is the accused's attitude of mind that must determine his guilt, but that if they acquit him on count (1) and then consider under count (2) whether he is guilty of wounding with intent to do grievous bodily harm, or merely of unlawful wounding, the accused's attitude of mind is immaterial? This would involve a mental gymnastic that juries might find difficult.

Smith's case does not overrule *Steane's* case and *Hosegood* v. *Hosegood*[18] but distinguishes them on the basis that the principle restated in those authorities is confined to cases in which an actual or overall intent has to be proved. Overall intent is a new concept in criminal law. It is perhaps not easy to see how such cases are to be defined. Clearly they do not include cases of murder or wounding with intent to do grievous bodily harm. Are they confined to cases like *R.* v. *Steane* and cases of attempted murder or wounding with intent to murder, such as *R.* v. *Whybrow*, where the intent was said to be the principal ingredient in the offence? But what usually is the principal ingredient that distinguishes murder from manslaughter, and wounding with intent from unlawful wounding, if it is not intent? Or does overall intent mean one dominant intent amongst many? The intentions, motives and hopes with which an act is done are often many and complex. Why should crimes committed in such circumstances fall into a separate class to be dealt with differently from crimes committed with a single intent? *Smith's* case will for a long time have the most profound influence upon the criminal law. But may it some day be argued that whilst *obiter dicta* of the House of Lords are of the highest persuasive authority they are not binding, and that *Smith's* case is a binding authority only for the proposition that the summing-up of the trial judge was unexceptionable?

[17] *R.* v. *Whybrow* (1951) 35 Cr.App.R. 141.
[18] (1950) 66 T.L.R. 735.

THE RECOGNITION OF NEW RIGHTS

DENNIS LLOYD

IN a recent case the well-known actor, Mr. Alastair Sim, claimed an interlocutory injunction against the no less well-known food-canning company, Heinz, Ltd.[1] His complaint lay in connection with the broadcasting of a series of films by way of advertisement on commercial television. These films consisted of short sketches bearing names such as "Living Like a Lord," in the course of which a human figure in cartoon form appeared, and there emerged from that figure a human voice extolling some of the fifty-seven varieties of the company's products. Unfortunately, to apply an old saying, the voice was the voice of Jacob but the hands were the hands of Esau, or to be more exact the voice was that of Mr. Ron Moody—an actor given to impersonations, and in particular impersonations of the very distinctive vocal effects of Mr. Sim—but the sounds which emerged to expectant viewers were unmistakably those associated in the public mind with the voice of Mr. Alastair Sim. Mr. Sim, who had never consented to any such arrangement, not unnaturally took umbrage at this unsought exploitation of his fame; among other things he pointed out that he had never associated himself with television advertising and that commentaries of this sort were not generally made by actors of his standing and reputation. This it may be thought was a legitimate enough grievance and not one which should be without remedy in law. Yet how was Mr. Sim, or his legal advisers, to formulate his claim? One possibility was defamation, on the analogy of *Tolley* v. *Fry*,[2] though that case turned on the *amateur* status of the aggrieved Mr. Tolley, whose reputation had been impugned by a suggestion that he had allowed his name to be used for advertising purposes. For it might be said that no similar stigma would attach to a professional actor in such circumstances. The only other possibility

[1] *Sim* v. *Heinz, Ltd.* [1959] 1 All E.R. 547.
[2] [1931] A.C. 333.

seemed to be a form of passing-off action, and so it was contended for the plaintiff, and it is with this aspect of the case alone that I am for the present purpose concerned.

"Property" in the Human Voice

McNair J., who tried the case, put the argument in this way[3]: "It was urged before me that in the case of a professional man like an actor, his reputation in the mind of the public, based on his performances, is a right of property capable of invasion, just as is the right of property contained in a particular kind of goods or method of get-up of goods, and that here the defendants were passing off as and for a performance by the plaintiff a performance that was not by him. Put in a slightly different way, it was said that an actor had business or trade vesting in performance by him of dramatic or musical works and that his goodwill lay in that performance. To confuse the public as to his performances was to do injury to that goodwill.

"I am not at this stage going to rule on the question whether, in any circumstances, an action of passing off would lie for the unauthorised use of a man's voice, be he actor or not an actor, though it would seem to be a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent."

The learned judge, having decided, for reasons which need not concern us here, that an interlocutory injunction was in any event inappropriate in the circumstances, was thus relieved of the necessity of tackling the difficult question referred to in the above passage.

On appeal, the Court of Appeal adopted a similar attitude. In refusing an injunction in the particular circumstances, Hodson L.J. had this to say about passing off: "On any view of the matter this is a novel form of action for passing off. The plaintiff contends that his voice as an actor is part of his stock-in-trade and therefore is something which he is entitled to protect as part of his goods. No doubt that is an arguable case, but there are various questions to be determined in this action, which has not yet been tried, including

[3] [1959] 1 All E.R. 547, at p. 551.

the question whether this voice can in truth be regarded as a property and whether in the circumstances of this case there could be said to be anything in the nature of unfair trade competition in a common field, where one actor uses his voice in the performance of his particular occupation and another actor in some way imitates that voice on television for advertising purposes. In my view, it is not right for this court to express any opinion in these matters." [4]

Now I do not submit this case for consideration because I think it embodies in itself any point of vast legal consequence, but rather as an example of an attitude, and one which has far wider implications than the comparatively limited issue with which the court was invited to deal, but with which it in fact shrank from dealing. Here we have a novel situation, though not one lacking in social and economic importance as well as piquancy, to which the existing legal categories afford no ready or obvious solution. To leave the plaintiff without a remedy may seem unjust and involve a well-deserved reflection on the legal system; but to grant a remedy may equally seem open to the criticism that it involves the creation and recognition of a new right, an apparent assumption of a legislative faculty that courts at the present day hesitate to accept or at least to do so too openly, lest they be accused of a usurpation of authority vested elsewhere by our constitution.

Legal Concepts and their Function

It is not surprising therefore, in a dilemma such as this, that courts seek to shelter behind certain traditional attitudes. I do not propose to attempt to enumerate all these attitudes but two of them sufficiently manifested themselves in the case to which I have just referred. One is the very natural and doubtless justifiable reluctance to decide a novel point at all if the case can somehow be disposed of on some other innocuous, though possibly subsidiary, point. The other, the one with which I am particularly concerned here, is to try to see whether the case can be brought to rest within some well-established category or rubric, so that the court and the legal

[4] *Ibid.* pp. 549–550.

profession generally may comfort themselves with the reflection that no harm has been done to the immemorial fabric of the law, that no revolutionary novelty has been admitted, that all is as it was before, save only perhaps that the law has re-examined or redefined one of its basic concepts, and thus been able to do justice strictly within the four corners of its traditional framework. What I want to question are not only the assumptions underlying this attitude but also whether maintaining this particular screen may not be positively harmful both to the scientific development of our legal system and, what is perhaps more important, the social functions that it is concerned to fulfil.

You will all remember the classic tale of Hans Andersen, where the little child in its innocence points out that, amidst the universal acclaim of the Emperor's new clothes, that monarch was in fact in a state of total nudity. Now I am not proposing to argue the point, nor do I think it is deserving of much consideration, that the categories and concepts of the law are mere meaningless symbols which serve only to befog and confuse and never to clarify. On the contrary, I think that conceptual thinking is an essential feature of human thought in law as in other fields, and the lawyer no less than the scientist would be helpless without some framework of categories in which to develop his reasoning. All I desire to rebut is the attempt, so to speak, to distil the development of the law out of a fixed framework of concepts, so that these become the masters rather than the servants of the argument. What I am seeking therefore to contend is that general concepts, however essential to give the law a general framework and thus produce a scientifically articulated system, should always be recognised for what they are, means rather than ends, not fixed for all times, but ready where necessary to yield to re-examination, or to the pressure of new principles of perhaps greater flexibility and greater social value in new contexts.

The Meaning of "Property"

It will have been remarked in the *Alastair Sim* case that one of these traditional concepts was very well to the fore, namely, that of "property," and that the court was of opinion that the real issue

in the case might well prove to be, whether a man could have a "property" in his own voice. Yet this might seem a strange question, not only to a layman, but even to a lawyer, until one reflects on the extraordinary history and pervasive influence of the idea of property in the political and legal thought of our civilisation. The ordinary person may think of it merely in relation to land or goods, but so wide at times has been its ambit that it has sometimes threatened to swallow up every aspect of human life and government. Let me remind you, for instance, of the language of John Locke, a voice especially pregnant with significance for the legal thought of the common law world:

> "Man being born . . . with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property—*that is, his life, liberty, and estate*, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others. . . ." [5]

And again:

> "Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his." [6]

Property thus we see doing service in strange places, but against such a background, the modern lawyer's idea of a man having a "property" in his own voice, if not less odd, is at least understandable. Indeed, the idea of property has often been used as a means of demarcating the sphere of human autonomy and freedom. Hegel, for instance, gives as one definition of property "an external sphere of freedom." As one modern writer points out,

> "property played a central role in the development of the philosophy of law of the preceding centuries. . . . Not only

[5] *Of Civil Government*, Chap. 7, § 87.
[6] *Op. cit.*, Chap. 5, § 26.

liberals but writers like Bodin described property as a realm of private autonomy removed from the inroads of even the absolute state. They all conceived the protection of this sphere to be one of the most important aspects of any legal order. This doctrine, which was developed out of ideas already present in Scholasticism, namely, that private property is inviolable, obviously suited the predominant interest of the rising middle classes with which the lawyers who promoted these conceptions were closely linked. Bodin and Althusius, Grotius and Coke, Pufendorf and Locke—they all belong in this context. The whole development rests upon a conviction, which was repeated again and again and was never seriously questioned, that property provides the essential safeguard for the freedom of the individual. The free man can be only a man of property, and for a long time it was believed that therefore only a man of property ought to participate in political life. Hence not only in Europe but in America, property qualifications remained a universally accepted condition for participation in elections until far into the nineteenth century." [7]

Of course, throughout this period voices were raised against the linking of property and freedom, voices which have culminated, on the one hand, in the Marxist-Communist rejection of private property as a valid concept, and, on the other, in the stringent restraints imposed on its power in the interests of social democracy. My present point, however, is a far more limited one, namely, whether the use of such a concept as "property," for all its rich and teeming background as a platform for political and legal theorising, is really apt, in the context of present-day life, for the solution of some of the new social and economic problems with which our courts now have to grapple. I am not, of course, denying that property is one of those basic ideas with which we cannot dispense, as indeed even the Marxist has discovered, but what I do feel, and feel strongly, is that it may well be better candidly to devise or recognise new principles as more fitting to cope with the novel legal problems of our age, rather than try to see how much

[7] C. J. Friedrich, *Philosophy of Law in Historical Perspective* (1958), pp. 145–146.

elasticity can be imparted to such traditional concepts without bursting them altogether.

Would it not be better, for instance, and certainly more in accordance with modern notions, instead of pausing to inquire whether Mr. Sim's voice is a kind of property which the law can protect, to recognise that developments in the entertainment industry make it incumbent on the courts, as indeed McNair J. appeared to think, to afford an actor some protection regardless of the proprietary nature or otherwise of the human voice? Indeed, as I have said, there is a certain danger in the attitude which approaches such questions from the point of view whether a novel situation can be forced into the four corners of an established category such as property. For, on the whole, though not invariably, a court will be disposed to regard such a category as fairly well defined for legal purposes and will therefore tend to put a heavy onus on the claimant who is seeking to argue that his novel case can be fitted within that category. In a period when the law has constantly to make adjustments to fresh situations—which applies especially to an age of technology such as ours—it may well be desirable for the court to have at its disposal more liberal principles which enable it to regard harms inflicted, of however novel a kind, as at least prima facie qualifying for legal remedy, unless there is good reason to the contrary. Whether such principles are to be found in the present state of our law may well be and has been questioned, though for my part I think they can. Certainly, I would be sorry to think that our law is helpless at this critical juncture to develop along broader lines. But before seeking to indicate where relief may perhaps be sought, I feel that it is first necessary to give some other illustrations from our modern law of the sort of strait-jacket that it has sometimes imposed upon itself to restrict its freedom to deal with new and pressing problems.

The Basis of Passing-Off Actions

It may be recalled that in the case of *Abbott* v. *Sullivan*,[8] where a cornporter's name was wrongfully removed from the register of

[8] [1952] 1 K.B. 189.

cornporters employed in the London Docks, the trial judge thought that the plaintiff was not entitled to damages for the *ultra vires* action of the committee because " he could not see any legal peg on which to hang " such an award. In the particular circumstances of that case, the " legal pegs " of property, contract, and intentional wrongdoing were all tried and found wanting. The reports are full of cases where the courts have invoked the rather overworked concept of " property " as a legal peg on which to found a cause of action. In the sphere of the so-called passing-off action, which seems to derive partly from the common law concept of tort, and partly from the availability of the equitable remedy of an injunction, the court has frequently treated the right infringed as a kind of proprietary right. Thus, Goddard L.J. once remarked that " the true basis of the action is that the passing off . . . injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business." [9] And in the recent case in 1959 of *Bollinger* v. *Costa Brava Wine Co.*[10] Danckwerts J. referred approvingly to the view expressed in Winfield that, in general, trade competition is lawful and that in the case of unlawful competition such as interference by threats, slander of title and passing off, the basis of the proceedings is the protection of rights of property affecting the plaintiff's trade. Yet in what strange guises this property manifests itself. Thus, we are told that the name or the " get-up " of an article may become part of a person's " stock-in-trade," to be treated apparently as a part of the assets of the business and therefore entitled to protection. Nor apparently is this confined to purely commercial matters for, as Vaisey J. has remarked, " if a man, be he musician, portrait painter or writer of articles in newspapers, gets to be known under a particular name, that name becomes inevitably part of his stock-in-trade, and apart from some special contract or anything of that kind, he is entitled to say that it is his name, and that anyone who adopts or causes the adoption of that name by some other person is inflicting on him an injury." In the case from which this quotation is derived, *Hines* v. *Winnick*,[11] an entertainer who regaled the public in broadcasts

[9] *Draper* v. *Trist* [1939] 3 All E.R. 513, at p. 526.
[10] [1959] 3 All E.R. 800, at p. 805.
[11] [1947] Ch. 708.

under the description "Dr. Crock and his Crackpots" was therefore held entitled to this soubriquet and to be protected against the use of it by others.

This so-called right of property, however, has many strange features. For example, it does not avail unless there is some common field of activity between the plaintiff and the defendant, and on this account "Uncle Mac" of the B.B.C. was not entitled to prevent the distribution, without his consent, of "Uncle Mac's Puffed Wheat." In that case it was solemnly laid down by Wynn-Parry J. that: "It is established beyond argument that under the law of England a man is not entitled to exclusive proprietary rights in a fancy name *in vacuo*."[12] Moreover, there must be some possibility of confusion in the minds of the public, so that when the "Welter-weight Champion of Trinidad" sought an injunction to restrain another boxer from describing himself in this country by that same title, an injunction was refused on the ground that, as no one in this country had heard of the plaintiff anyhow, he could not claim that anyone was likely to confuse the defendant with himself.[13] Harman J. remarked that although the plaintiff had good reason to complain of what the defendant did, he had chosen the wrong remedy. The learned judge conceded, however, that the only alternative cause of action would have been injurious falsehood, which required express malice and which the plaintiff was not in a position to prove. This situation led the judge to observe that it occurred to him for the first time during the hearing to regret the abolition of ordeal by battle as a method of trial.

Goodwill and Property

We have already seen in the *Alastair Sim* case that it may even be arguable that a person's voice is part of his stock-in-trade. Might this not also extend to a distinctive personal appearance, whether part of a man's actual physique or an habitual style of dress or presentation, as, for instance, that of Charlie Chaplin or the Marx Brothers? All these may be part of a man's so-called "goodwill"

[12] *McCulloch* v. *May, Ltd.* [1947] 2 All E.R. 845, at p. 849.
[13] *Serville* v. *Constance* [1954] 1 W.L.R. 487.

and therefore apparently rank for protection as rights of property. Goodwill itself, although long recognised as a kind of proprietary right, has many unusual features. It was once described by Lord Eldon as " nothing more than the probability that the old customers will resort to the old place." [14] But, as Lord Macnaghten pointed out in *Trego* v. *Hunt* [15]: " Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money." Hence the readiness in modern times to treat it as an incorporeal proprietary right and one that can be freely assigned on the sale of a business, even where the goodwill is really personal, depending primarily on the skill of the person owning it.

I would not wish to be understood as necessarily criticising the modern tendency to regard goodwill itself as a kind of property, since this accords with modern commercial and accountancy practice and no doubt has many conveniences, even though it may be very arguable that the same or even better results could have been achieved by the simple expedient of widening the principles of tort law in connection with unfair competition. What, however, does need to be pointed out is the very odd shape that this concept of goodwill as a proprietary interest may at times be asked to assume, and the inhibitions that this may induce in the smooth development of the law. For instance, it may be argued that you cannot have a goodwill in a proprietary sense in your own voice since (or so it may be contended) it is grotesque to suppose that a man could lawfully or validly assign such a right to another person. Yet this type of highly conceptual argument would hardly arise if the law approached these problems rather from the angle whether the defendant has been guilty of an act of unfair competition. Recently, in the *Bollinger* case, a similar kind of conceptual difficulty arose in connection with an attempt by the French Champagne growers to restrain the sale of so-called " Spanish Champagne " in this country. For the defendants it was contended

[14] *Cruttwell* v. *Lye* (1810) 17 Ves. 346.
[15] [1896] A.C. at pp. 23–24.

that the description "Champagne" referred to a geographical area, and that the growers of Champagne wine were merely a class of persons producing goods in that particular area, and so could not be entitled as individuals to goodwill in the name "Champagne" as a right of property. Admittedly these arguments failed in this instance, but they do serve as an indication of the unreal atmosphere in which such cases are sometimes conducted, for could anyone seriously doubt that on any rational legal principle the defendants' conduct deserved to be stigmatised as unfair competition? [15a]

Medieval Survivals

So far I have concentrated primarily on the use of the concept of property in the development of our modern law of passing off and injuries to goodwill. But there are many other forms of activity for which the ubiquitous notion of a proprietary right has been prayed in aid as a justification for legal protection. Thus, both the right to vote [16] and even the right to hold office, for instance in a trade union,[17] have been held to be rights of property entitled to protection as such, even though such rights are clearly incapable, generally speaking, of being assigned or transmitted. It is not easy to see what is gained by this sort of approach. Indeed, the idea behind these cases seems to hark back to the medieval notion of a "franchise" as a form of property, but hardly seems consonant with the social attitudes of the present day, any more than does the medieval doctrine that a husband has a kind of proprietary interest in his wife or a master a right of property in the services of his servant. The illogical result of this approach is sufficiently illustrated by the leading case of *Best* v. *Samuel Fox, Ltd.*,[18] where a wife was held not entitled to any damages for injuries to her husband, rendering him incapable of sexual intercourse, and so depriving her of the full *consortium* of her husband. It was conceded that had the injury been to the wife, the husband would

15a As subsequently so held in *Bollinger* v. *Costa Brava Wine Co.* (*No.* 2) [1961] 1 All E.R. 561.

16 See *Osborne* v. *A. S. R. S.* [1911] 1 Ch.D. 540, at pp. 554 and 567.

17 See the modern American cases, *Dusing* v. *Nuzzo* (1941) 29 N.Y.S. 2d 882; *Bianco* v. *Eisen* (1944) 75 N.Y.S. 2d 914; *Caliendo* v. *McFarland* (1958) 175 N.Y. 2d 869.

18 [1952] A.C. 716.

have been entitled to damages,[19] but this was dismissed as an historical anomaly derived from the proprietary relationship to which I have referred, and which was incompatible with modern notions and therefore not to be extended. Certainly one may grant the inappropriateness of proprietary ideas derived from medieval villeinage and serfdom as applied to such a personal relationship as that of husband and wife, but once eliminate this historical relic and it becomes easier to evaluate the social significance of a husband's right to complain of injury to his wife by the wrongful act of a third party. In modern times this may be said to lie in the interest of the husband in his wife's safety and well-being and his claim that these should not be jeopardised by the unlawful acts of others. Indeed, in this guise there does not seem anything particularly archaic about it, or that it necessarily represents a survival of serfdom, and whatever may be the social and economic arguments for or against such liability, nothing could be more anomalous at the present day than to allow the right of action at the suit of the husband, while refusing it at the suit of the wife.

Property in "Ideas"

Can one have a right of property in an "idea" as such? It is, of course, well settled that copyright cannot subsist in mere ideas but only in the literary form in which those ideas are clothed. A man cannot have copyright in the plot of a novel or the story of a play, but only in the form of words in which that plot or story is expressed. However, even so much cannot be stated without qualification, since in the case of a dramatic work the reproduction of incidents or dramatic situations in substantially the order or arrangement they occur in the original may be an infringement. In other words, although there may be no actual language copied, the dramatic treatment may so closely resemble that of the original as to amount to unlawful copying.[20] To this extent, ideas may

[19] Subject to the unresolved question whether such action will lie for *impairment* as distinct from *loss* of *consortium*, which is irrelevant to the present discussion.

[20] See *Rees* v. *Melville*, MacG.Cop.Cas. (1911–16), 168; *Sutton Vane* v. *Famous Players Film Co., Ltd.*, MacG.Cop.Cas. (1928–35), 6. It would seem that this position has not been affected by the new wording of s. 2 (5) and (6) of the Copyright Act, 1956.

enjoy proprietary protection, and presumably whatever the medium employed, as for instance where incidents in a play are copied for transmission in a version for sound radio or television. But can ideas be protected where no question of copyright arises? Suppose, for instance, that a person submits an idea for a programme to a television company, and the company, shortly after writing back to reject the idea, then proceeds to use it in subsequent broadcasts. Certainly, in such a case, the " only begetter " of the idea may well nurse a legitimate grievance against the company, but whether he has a cause of action is a very different matter. Surprisingly enough, this type of situation has not been specifically considered in this country, but in the United States it has been both amply discussed and litigated upon in many forms and in many jurisdictions. Much confusion seems to have resulted in some of the earlier cases, though apparently now dispelled by later decisions, by the introduction of the question whether there could be property in ideas so as to provide a basis for legal protection. Thus, some courts approached the issue from the point of view that a novel idea may be the property of the originator prior to disclosure, and that it is therefore necessary to consider whether the mode of disclosure has put an end to the right of property. For instance, in *Belt* v. *Hamilton National Bank*[21] in 1952, the plaintiff had submitted to the defendants the idea of sponsoring a series of half-hour weekly radio programmes with talent to be selected by auditions in the high schools. Suggestions were also made as to the mode of presentation of this series. A provisional contract between the parties was entered into but was later cancelled (as the defendants were entitled to do) when the school authorities refused their approval. Some time after this the defendants sponsored a similar series without acknowledgment or remuneration to the plaintiff. The plaintiff was held entitled to recover damages apparently on the footing that he enjoyed a common law property in the ideas disclosed, and that these had not become public property on disclosure to the defendant bank.

The illogicality and indeed the dangers of this sort of approach

[21] 108 F.Supp. 689 (1952).

are manifest enough. Illogical, because as Justice Brandeis once remarked, "an essential element of individual property is the legal right to exclude others from enjoying it," [22] and it is hard to see how the originator of the novel idea could lawfully prevent others from using it. And the recognition of some kind of unlimited monopoly in ideas may also have very real dangers. Unsolicited ideas may pour in a steady stream into such lucrative sources of entertainment as commercial television. Is the originator of an unsolicited and unwanted general idea for a programme to be entitled ever after to prevent those to whom he has disclosed his idea from making use of any similar ideas without his consent? Moreover, by circularising the relatively few programme companies in the industry he could automatically obtain a virtual monopoly for his ideas throughout that medium of communication.

Later American cases seem to have awakened to these perils and to have declined to recognise a right of action save where the plaintiff can point to an express contract or where a contract can be implied from the circumstances. For this purpose the disclosure itself may be the valuable consideration for the implied promise, and the court will generally imply a contract if the producer had an opportunity to reject the idea submitted before its disclosure and nevertheless voluntarily accepted its disclosure. On the other hand, an ideas man who first discloses his ideas unasked and then demands payment when he finds them adopted will get little sympathy from the courts.[23] Broadly speaking, this accords with the position arrived at in the earlier English case of *Lehwess* v. *Austin Motor Co., Ltd.*,[24] where damages were recovered for breach of an implied contract of confidence, the plaintiff having disclosed in confidence to the defendants his ideas relating to a "sunshine-roof," which they proceeded to make use of for their own purposes in breach of the agreement. I think that there is little doubt that the English courts would refuse, in the type of case to which I have referred, to accept that there could be a right of property in ideas

[22] *International News Service* v. *Associated Press*, 248 U.S. 215 (1918).

[23] See the full discussion of the American cases, by H. R. Olssen, in *Law & Contemporary Problems*, Vol. 23 (1958), "Radio & Television," Pt. II, p. 34 ("Dreams for Sale").

[24] [1935] A.C. 346.

as such, and like the American decisions would prefer to rely on express or implied contract.

These American cases thus illustrate not only the reserve with which new rights of *property* should be regarded as a means of developing the law, but also the fact that new claims which compete for the attention of our courts are not necessarily deserving of recognition. We must guard against the facile idea that new growth is necessarily beneficial; it is, for instance, still very much an open question whether a so-called " right of privacy " might not remove some legitimate individual grievances at the disproportionate cost of imposing excessive restrictions on public channels of communication. My present purpose is not to argue either for or against the recognition of any particular new class of right, but merely to plead for a sounder juristic form of legal development than that displayed in the cases which discuss whether there can be a right of property, a special or qualified property, or a quasi-proprietary interest in this or that. For such discussion rarely attempts to analyse or examine the meaning of these concepts in their particular context, and perhaps for the very good reason that they are frequently meaningless and used as a way of dodging, rather than facing, the real issue.

An Alternative Approach

What alternative approach is likely to present more fruitful and constructive possibilities both with regard to the scientific development of legal principle, on the one hand, and its adaptability to meet new social and economic needs as these arise and are reflected in the day-to-day litigation of our courts? Lawyers are cautious people who display a natural preference for well-tried formulas, and derive much comfort in approaching a novel problem from a familiar angle. Hence the feeling of being on more solid ground if the court can justify granting a remedy by resting upon so well worn a concept as the right of property, and the attempt to give at least a semblance of orthodoxy to a new solution by reliance on such indeterminate conceptions as a " special relationship " or a " quasi-proprietary " interest (the prefix " quasi " is nearly always

a sign of the lawyer's last desperate attempt to preserve his respectability). The idea of implied contract may also occasionally do good service. For instance, in the cases dealing with expulsion of members from clubs, trade unions and other associations, the modern cases have turned from the older idea of basing the aggrieved member's claim on his right of property, in favour of the far more flexible instrument of implied contract, though even here there remains a good deal of artificiality, not to say conceptualism, in the way this is applied.[25] As I have intimated, a framework of conceptual thinking is fundamental to legal reasoning, but there is always a certain danger that such concepts will serve merely to conceal the real social problem which faces the courts and will result in a purely technical and formal approach to new situations. This danger seems to me particularly manifest when the court tries to resolve complex legal and social problems by seeing whether so formal a concept as the right of property can be adapted to new and seemingly arbitrary extensions. In the result such an attitude tends, though not invariably, to produce a restrictive approach, a presumption against change or new development. Not that I suggest that the court should necessarily entertain a presumption in favour of such change; the highest I would personally seek to put it is that I should like to see an attitude rather of neutrality; a recognition that the law *is* capable of development; that this is at least partly a social as well as a technical problem; and that the task of the modern lawyer is not to be mastered by his technical equipment but rather to see that it serves the needs of the community.

It must not be thought that all that is needed for this purpose is some general principle of liability, such as, for instance, the fault principle in the French civil code. Anyone familiar with the modern French law of civil responsibility will know that this seemingly simple starting-point has led to a morass of technical doctrine and case-law fully comparable to that contained in our own law of tort. At the same time, what I think we must recognise is that there have to be some built-in principles and concepts in any

[25] See D. Lloyd, "The Right to Work," 10 *Current Legal Problems* (1956), p. 36.

legal system which does not wish to emulate the law of the Medes and Persians, in order to give it room for manoeuvre and scope for development. The right of property is, as we have seen, one such concept, though I feel it is, at the present day, an inadequate one, to be used sparingly when other more up-to-date instruments are to hand. It is quite impossible and probably undesirable to attempt to catalogue or state precisely the list of such built-in principles; indeed, their very virtue lies in their fluid and indeterminate character. All I am going to do now in concluding is to refer very briefly to two possible contenders for inclusion.

Remedies and Rights

In the days of the old common law the emphasis on procedure, namely, whether a certain writ would issue in a particular case, caused the court to approach new legal problems from the point of view whether a remedy would be granted, rather than whether the plaintiffs had a right in the first instance. In other words, the granting of a remedy led to the recognition or creation, if you like, of a right, rather than the other way round. Whatever criticism may be launched against the old common law system as a whole, there is much to be said for this particular way of looking at the matter, since it places emphasis on the need for a remedy rather than the abstract question whether the plaintiff has a pre-existing right. The changes in our procedure have undoubtedly led to the emphasis being the other way; we now tend to ask whether the plaintiff has a cause of action, and to inquire, in a doubtful case, what right he may possess *vis-à-vis* the defendant. There is no reason why the law should not develop on these lines provided the court does not unduly frighten itself by such dogmas as that there is no power, save by legislative intervention, to create new rights. For not only is this historically untrue, but its acceptance would be the virtual end of common law creativity and adaptability. It is also important to bear in mind that new rights recognised from time to time by the courts need not be rights of *property*, but may, for instance, be simply extensions of tort principles preventing

others from interfering with the plaintiff or doing harm to him in particular ways.

Liability for Intentional Harm

The natural reluctance of courts to recognise the existence of new rights points to the advantage of some principle which will enable the court to examine new situations rather in the spirit of the old common law, *viz.*: whether this is the sort of harm for which the plaintiff should have a remedy. One way in which there may still be useful scope for this approach is in those cases where an equitable remedy, particularly an injunction, may be granted even though there has been no actual tort or breach of contract. Time will not permit me to say more about this difficult question.[26] But I do want finally to mention the possible scope for developing the principle of intentional harm. I think the problem arises mainly at the present day in connection with purely *pecuniary* harm, as opposed to physical injury.[27] It is quite true that in *Abbott* v. *Sullivan*[28] the Court of Appeal declined to accept that there was any general liability for intentional harm, so that this principle might be regarded as a non-starter. With all respect, I do not think this is so, because I feel that all the court meant in that case was that there was no general principle known to our law that *all* intentional harm was necessarily actionable. Nor would I contend for so sweeping a generalisation. What I suggest is, that the possibility remains open of a court from time to time recognising particular forms of intentional harm,[29] where the harm is merely pecuniary, as actionable. The modern cases on interference with contractual relations afford an indication of how a gradual development of this kind may occur; and recently in Canada[30] the Supreme Court has applied this sort of approach to the case of wrongful expulsion from a trade union, thereby not following *Abbott* v. *Sullivan*.

[26] *Cf. ibid.* p. 46.

[27] It is in regard to cases of pecuniary harm that the main limits on our modern law of negligence seem to be imposed. Consider, *e.g.*, *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.

[28] [1952] 1 K.B. 189.

[29] For the meaning of "intention," see *Thompson, Ltd.* v. *Deakin* [1952] Ch. 646.

[30] *Orchard* v. *Tunney* [1957] S.C.R. 436; and see comment thereon by D. Lloyd, in 36 Can.B.R. (1958), p. 83.

Here then, I would urge, is a useful built-in principle of the common law, and one which does not lack respectable parentage,[31] and which may yet afford scope for future development. The value of such a principle seems to me also to lie in the fact that the court is enabled to evaluate, so far as lies in its power, the social consequence of admitting or denying that intentional harm should be actionable in the particular circumstances of the case.[32] And what could be more in line with that empirical approach which so many have regarded as the essence of the spirit of the common law?

31 See, *e.g.*, the well-known passage in the judgment of Bowen L.J. in *Mogul Steamship Co* v. *McGregor, Gow* (1889) 23 Q.B.D. 598; also Pollock, *Torts* (15th ed.), p. 17; and *cf.* Holmes J.'s theory of prima facie liability for unjustified infliction of harm in "Privilege, Malice and Intent," 8 Harv.L.R. (1894), p. 1. For a discussion of recent Canadian developments in industrial cases, see H. W. Arthurs, "Tort Liability for Strikes in Canada," in 38 Can.B.R. (1960), pp. 373–388, 394–403.

32 The court would also have to assess the weight of such factors in determining what might or might not constitute a "lawful justification": see, *e.g.*, *Brimelow* v. *Casson* [1924] 1 Ch. 302.

REFLECTIONS ON THE CONSTRUCTION OF WILLS

E. C. Ryder

The rules of English law governing the construction of wills have tended to attract a good deal of criticism from professional sources. It has sometimes been suggested that they serve no useful purpose, and it has often been said or implied that the application of them by the courts is mischievous because it tends to impose artificial meanings on provisions in wills and to defeat the real intentions of testators. When Eve J. once expressed his fear that he would be met on the other side of the Styx by the ghosts of angry testators whose wills he had misconstrued, he no doubt did not intend to be taken seriously, but there was probably some apprehension at the back of his mind that the rules of construction in the Chancery Division did not produce satisfactory results.

Criticisms of Rules of Construction

The *locus classicus* of serious criticism of the rules is contained in the speech of Lord Atkin in the case of *Perrin* v. *Morgan*,[1] in which the question in issue was whether a gift of money in a will carried anything but cash in hand and at the bank. Lord Atkin said[2]: "The result of your lordship's decision will be to relieve judges in the future from the thraldom, often I think self-imposed, of judgments in other cases believed to constrain them to give a meaning to wills which they know to be contrary to the testator's intention." Whether these words are to be taken to refer to rules of construction generally, or merely to the rule or supposed rule which was under consideration in the case, is not quite clear, though Lord Russell of Killowen appears to have thought that they were intended to be of general application, for he went out of his

[1] [1943] A.C. 399.
[2] At p. 415.

way to say: "Let it be clear that nothing in this case affects indirectly any other of the many rules for the construction of wills." At all events, Lord Atkin's observations, if meant to be understood generally, are fairly typical of what is not infrequently said and thought on the subject. It may be worth while to look in a general way at the law governing the construction of wills, and to see what underlies these criticisms and what there is to be said on the other side.

Two Classes of Rules

The rules to be examined fall into two classes, the boundary between which is fairly well defined. The first class consists of certain broad principles which do no more than lay down the way in which problems of construction ought to be approached: for instance, the rule that the meaning of the testator must in general be sought in the will itself to the exclusion of extrinsic evidence tending to establish what he had in mind[3]: the rule that technical terms must prima facie be interpreted in their technical sense[4]; the rule that speculation as to the testator's meaning is inadmissible, the only question being what he has said in the will[5]; and so forth. It is not at these rules that criticism is mainly directed. Though the application of them may on occasion produce results which seem odd to the untrained mind, they are for the most part based on sound reasons. If, for instance, extrinsic evidence were freely admitted to determine what the testator had in mind, and to add to, or to perhaps contradict what he has written, the rule that wills must be in writing would be rendered ineffective and it is important to adhere to that rule so as to prevent fraud.

Similarly, the rule that technical terms must prima facie be given their technical meaning is amply justified by the consideration that to give them any other meaning, in the absence of a context indicating one, would be to open the door to mere conjecture. In *Re Cook*,[6] where the testatrix's will consisted of the words "all my

[3] *Doe* d. *Hiscocks* v. *Hiscocks* (1839) 5 M. & W. 363, at p. 367.
[4] See *Roddy* v. *Fitzgerald* (1858) 6 H.L.C. 823, at p. 877, *per* Lord Wensleydale.
[5] *Ralph* v. *Carrick* (1879) 11 Ch.D. 873, at p. 878, *per* Cotton L.J.
[6] [1948] Ch. 212.

personal property to X" and she died leaving a small amount of personalty and a freehold house, she would perhaps have been surprised if told that her will would necessarily be construed as extending only to her personalty and that she would die intestate as to the realty, but to attribute any meaning other than the technical one to the term "personal" would be to pass from the realm of construction to that of pure supposition.

Nature of Detailed Rules of Construction

In contradistinction to these general canons, there are detailed rules of construction laying down the proper interpretation of particular expressions and forms of words. They are never more than guides to the meaning: they merely lay down that particular expressions shall be interpreted in a particular way, if no contrary intention appears from the will read in the light of the surrounding circumstances at the time it was made. Most of these rules have come into existence as a result of decisions of the courts, and they have often slipped almost unnoticed into the law. The process is familiar. A particular will is construed by a judge who is not concerned to lay down any general principle, but simply to give a reasoned judgment on the meaning of the words before him. His decision involves a process of reasoning: it is cited in subsequent cases where the point arising is the same or similar, and it comes to be generally accepted that there is a rule of construction which owes its origin to the first case.[7]

The number of reported cases on construction points is very large, and any of them may operate to influence decisions in later cases, that is to lay down what is a rule of construction, whether referred to by that title or not. Protests are made from time to time to the effect that too many such cases are reported, and suggestions are made that it would be better for reporters to let most construction cases sink into oblivion. These protests will always be unavailing: cases that are likely to be of assistance or guidance to the Bench and the Bar will be reported whether critics

[7] Compare Lord Eldon's judgment in *Sibley* v. *Perry* (1802) 7 Ves. 522 with statements of the "rule in *Sibley* v. *Perry*" in later cases, *e.g.*, *Re Timson* [1916] 2 Ch. 362.

think it expedient or not. It is also pointed out periodically that the duty of a judge confronted with a will to construe is to look at the will itself first, and not to feel constrained to decide that, because a particular disposition was given a particular meaning in a previous case, it must necessarily have the same effect in the case before the court. But however much lip-service may be paid to this principle, a judge deciding on the construction of a particular form of words in practice finds it impossible to disregard a train of reasoning forming the basis of a decision in an earlier case in which a similar form of words was construed, unless something in the context gives him good reason for doing so. Thus, in construing wills judges are necessarily assisted, or trammelled, as one chooses to look at it, by a large mass of authorities.

The process of the development of case law is, of course, always liable to produce curious anomalies and unjustifiable rules, and this branch of the law is perhaps peculiarly subject to the aberrations inseparable from a system of precedent, because the judge who decides a point of construction is probably less concerned with the problem of laying down a general principle than if he were dealing with a question of pure law: he may be anxious to avoid laying down any general principle. There is no doubt that when the Wills Act, 1837, was passed, our law had developed several absurd rules of construction for which there was nothing at all to be said, which must normally or even invariably have operated to defeat what the testator had in mind. Instances will readily come to the minds of all lawyers: I will only mention the extraordinary rule that where there was a gift to A in fee simple followed by a gift over to B if A died without issue, the expression "if A die without issue" prima facie meant "if at any time after A's death there shall cease to be any descendants of A alive." [8]

This interpretation not only did violence to the plain words of the will, but rendered the gift over as it stood obnoxious to the rule against perpetuities; where the property was realty the judges avoided this unjust result by giving A an estate tail with remainder to B, but as A could bar his estate tail and so destroy the remainder, this did B no good. No such subterfuge was possible where the

[8] See *Jarman on Wills*, 8th ed., p. 1840.

property was personalty, and the gift over failed completely in such a case. Rules of this sort, creating an artificial complication where the language of the will was plain, were merely mischievous, and a number of them, including the one I have referred to, were very properly got rid of by the Wills Act, 1837.[9] It does not follow that all rules of construction are mischievous, or even that a complicated system of detailed rules could be dispensed with: it is significant that the Wills Act, 1837, itself got rid of several of the old bad rules not by merely abolishing them but by setting up new positive rules in place of them. It can fairly be said that rules of construction perform two distinct functions.

Functions of Rules of Construction

In the first place, they attach definite meanings to the commoner forms of words found in the precedent books, so that a professional draftsman can use those forms with a fair amount of confidence that they will produce the result he is aiming at. The importance of this function is obvious: as Lord Romer said in *Perrin* v. *Morgan*[10]: "It is no doubt of great importance to lawyers and others engaged in the preparation of wills that they should have the certainty of knowing that certain well-known words and phrases will receive from the court the meaning that the court has for generations past attributed to them." The case of *Re Steele's Will Trusts*[11] shows how useful rules of this sort may be. There a professionally drafted will contained a gift of a necklace coupled with words requesting the donee to do all in his power to give effect to a wish expressed by the testatrix that the necklace should descend as an heirloom. The form used was exactly the same, *mutatis mutandis*, as that contained in *Shelley* v. *Shelley*,[12] decided eighty years previously. In *Shelley* v. *Shelley* it had been held that the form in question operated to impose a trust on the donee, and in *Re Steele's Will Trusts* it was held that *Shelley* v. *Shelley* should be followed, in spite of the fact that the general tendency today is to

[9] As to the example given, see Wills Act, 1837, s. 29.
[10] [1943] A.C. 399.
[11] [1948] Ch. 603.
[12] (1868) L.R. 6 Eq. 540.

construe mere words of request as not intended to create a trust. The earlier decision must have supplied the draftsman of the will in *Re Steele's Will Trusts* with the form he used, and it was therefore right to treat the earlier decision as establishing a rule as to the meaning of that precise form: otherwise the intention of the testatrix would have been frustrated.

The other function of rules of construction is quite different from the first. It is the function of providing the means of answering the problems which arise when wills contain ambiguous, disjointed or incoherent provisions resulting from the incompetence of the draftsman, who is often, but by no means always, the testator himself. In many cases of this sort the search for the testator's meaning presents peculiar difficulties. It is not merely that the words of the will render it doubtful which of two, three or more possible meanings the testator really had in mind. What one finds very often is language which makes it very doubtful whether the testator had formed any well-defined intention at all, whether he would have been able to give any answer to the obvious questions to which the wording of the will gives rise.

Advantages of Rules of Construction

Now where the testator's incoherence or ambiguity passes a certain limit, the only possible course is to treat the disposition as void for uncertainty. But the court is reluctant to wash its hands of the problem: it will extract a meaning from the testator's words if it possibly can. Some sort of interpretation could no doubt be reached in all cases in which the incoherence of the wording was not of an extreme kind, by a process of reasoning based on the general principles of construction without resort to any detailed rules. Indeed, this is exactly what has to be done in some cases, those in which the testator has displayed such originality in his choice of language and the nature of his dispositions that there are no relevant authorities in point. But there are obvious advantages in having detailed rules of construction to fall back on. The decision of the court is likely to be more predictable if the judge has authority to guide him, and that means that counsel who is called upon to advise on

the meaning of the will can give an opinion which is more than mere conjecture, and which he can put forward with some confidence as representing the conclusion which the court would reach: an opinion, that is, on which trustees or executors can act, or which can at least be made the foundation of an agreement between all the interested parties as to the distribution of the estate. When such an opinion can be given, litigation can generally be avoided, and that is a most desirable result, particularly where the estate is of small value.

The inevitable artificiality and technicality of some of the rules are perhaps not too high a price to pay for the advantages of comparative certainty: to have some guide, however imperfect, is better than to have no guide at all. And it is unfair, in cases of the type under discussion, to speak of the rules as distorting the true meaning of the will and preventing the intention of the testator from taking effect. What many of the rules do, is to eke out the meagre and confused indications of intention given by the testator and make it possible to impute to him an intention which quite possibly he never formulated with any degree of distinctness: if some definite intention were not attributed to him, the problem presented by the wording of the will would be impossible of solution, and the rule makes it possible to say what intention ought to be imputed. Rules of this sort are really analogous to the rules which supplement the intention of the parties in particular types of contract, for example a contract for the sale of goods: like those rules they may be quite independent of real intention. It would perhaps disarm criticism if their real nature were more overtly recognised.

It might be supposed that rules of the type under discussion can only be of limited usefulness because the varieties of confusion and ambiguity to be met with in home-made wills, or wills made by incompetent professional draftsmen, must be infinite, so that the majority of cases will be entirely *sui generis* and will fall outside the scope of any pre-existing rule. This is not so in practice: for reasons which a psychologist could perhaps explain, when a testator leaves the strait and narrow path of clarity and precision, he tends to follow certain well-beaten tracks of error and to produce the same

difficulties and problems as large numbers of his predecessors. To take only one instance, it is well known how often unlearned testators make gifts by will of what they refer to as their "money" —an ambiguous term which may conceivably mean anything from the actual cash in the testator's possession to the whole of his real and personal estate. Hence the majority of the rules treated at length in *Jarman on Wills* or *Theobald on Wills* are found in practice to be applicable to problems which arise again and again, as indeed might be supposed from the large number of decided cases referred to in both books in which the rules have been applied, commented on and expanded or restricted.

It may help to throw some light on the question of the utility of these rules if I consider in turn two types of confusion into which testators are continually falling. In the first type of case, we shall find that there are some rules of construction; in the second case there are none to speak of. A comparison of the two types may enable us to judge whether rules of this kind really are of any utility or whether they could easily be dispensed with.

Death Referred to as a Contingency

The first type of case is that in which the testator refers to death in conditional terms, using some such expression as "if X dies" or "if anything happens to X." It is apparent that the use of the conditional form here is strictly an absurdity, since X's death is not a contingency but an event which is bound to happen. No doubt the frequency of the use of these expressions in home-made wills is due to the fact that testators like to speak of death in euphemistic terms: to refer to it as something that must happen seems too brutal, and they therefore take refuge in conditional expressions: they say "if anything should happen to X" when they mean no more than "on the death of X." But it by no means follows that this holds good in every case: the use of the conditional form may be due to the fact that what the testator has in mind is death in particular circumstances, or before some particular moment of time. Thus, to take a concrete instance, if a testator says: "I give all my estate to A but if he dies then to B" he may mean

that the property is to go over to B when A dies, or he may mean that B is to take the estate if the gift to A lapses because A dies before the testator himself. The difficulties are explained in the case of *Cambridge* v. *Rous*[13] by Sir William Grant M.R., who says: "The expression [*i.e.*, 'if he die'] itself is incorrect, as it applies words of contingency to an event which is certain. No man can with propriety speak of death as a contingent event which may or may not happen. When therefore a testator so expresses himself, the question is what he means by that inaccurate expression. He may perhaps have had some contingency in mind, as that the legatee was dead at the time he was making the will or might be dead before his own death or before the legacy should be payable: and then the inaccuracy consists in not specifying the period to which the death was to be referred. He might have meant to speak generally of the death, whenever it might happen, and then the contingent or conditional words must be rejected and words of absolute signification introduced."

In practice the context of the will may indicate what the testator had in mind. But suppose it does not (and it probably will not, where the will is in the peculiar laconic style which testators making their own wills commonly affect). In that case the authorities, as is well known, supply a fairly complete code of rules of interpretation which enable the problem to be solved with a fair degree of certainty in all simple cases. Where there is an immediate gift to A, but if he die then to B, the words "if he die" are taken prima facie to refer to the death of A in the lifetime of the testator, so that A takes absolutely if he survives the testator, but B takes absolutely if A dies in the lifetime of the testator.[13a] If, however, the gift to A is not immediate but future, the words "if A dies" are treated as referring to A's dying either during the lifetime of the testator or between the testator's death and the vesting in possession of A's interest.[13b] Thus, if the gift is to X for life, remainder to A but if A dies then to B, B will take if A dies either during the testator's lifetime or after the death of the testator, but before that

[13] (1802) 8 Ves. 12, at p. 21.
[13a] *Cambridge* v. *Rous*, *loc. cit.* in note 13, above; *Ommaney* v. *Bevan* (1811) 18 Ves. 291.
[13b] *Le Jeune* v. *Le Jeune* (1837) 2 Keen 701; *Ive* v. *King* (1852) 16 Beav. 46.

of the life-tenant X. Similarly, where the gift is to A if he attains twenty-one with a gift over if he die, the gift over will take effect if A predeceases the testator or if he survives him but dies under the age of twenty-one.

I do not think it is seriously open to doubt that these rules are altogether beneficial and useful. They produce certainty in cases which would otherwise be altogether doubtful, they enable firm opinions to be given as to the construction of wills in cases in which if there were no such rules an originating summons would have to be taken out to get the will construed by the court, and they are certainly not excessively technical. They are no doubt arbitrary in the sense that the meaning they impose on given forms of words may not have been what the testator actually had in mind: but when the testator has used a form which on the face of it contains an absurdity, and has not indicated which of two or more possible meanings he wishes to be given to that form, it is hardly open to anyone to complain if the law prescribes a particular interpretation, not inherently improbable, when any argument in favour of another solution would be based on nothing but the flimsiest speculation. It must be borne in mind that the courts will treat these rules as excluded where there is an indication that the testator had some other intention, and the indication relied on has often been quite minute. Thus, in *Watson* v. *Watson* [14] a testator left all his property to his son charged with an annuity to his widow, with a gift over "should the hand of death fall on my widow and son": it was held that the use of the word "widow" in this phrase showed that the testator could not have intended to provide for the case of the death of his wife and son during his own lifetime. It is only where there is nothing in the will to sway the court in one direction or another that the rules are applied to solve a problem which would otherwise be insoluble except by mere guesswork.

Gifts of "What Remains"

Here then is an example of a common difficulty of construction caused by the use of an ambiguous and prima facie absurd expression

[14] (1881) 7 P.D. 10.

and dealt with by sound and sensible rules of construction. The other type of testamentary problem is a complete contrast in everything but the frequency of its occurrence. I refer to the gift of " what remains " on the death of an absolute owner: a testator will give property to A absolutely and then go on to give what remains of it at A's death to B. This type of disposition, with minor variations, is often met with in home-made wills, so often that there must be some common influence working on the minds of unlearned testators and tending to give rise to it. It is perhaps permissible to conjecture that the cause of the trouble is that the average testator, like the Roman lawyer, conceives of ownership as indivisible: the possibility of its being split up into successive limited interests and parcelled out amongst two or more persons, each of whom has a fragment of the whole, has not occurred to him. Nor does he even conceive of the possibility of a usufruct or life interest in the nature of an incumbrance on ownership. It is easy for a testator who entertains these ideas to suppose that where two or more persons are interested in succession what happens is that one of them has for a limited time the full rights of an absolute owner over the property, including the right to spend or dispose of the capital, and that when that time comes to an end those rights pass to the next owner.

To anyone who thinks like this and wants to create successive interests, " I give all my estate to A, but what remains at his death is to go to B "—or words to that effect—must seem perfectly logical and sensible. The testator thinks that A will have all the powers of an owner during his life, and therefore contemplates the possibility of A's consuming either wholly or in part the capital of the property comprised in the gift to him. The testator therefore gives to B, not the whole of the property comprised in the gift to A, but only so much as is left after A has exercised his rights of disposition during his lifetime. And if the testator were examined about his intentions, it might well appear that all he really wanted to do was to give to A the sort of rights which a life interest would confer on him, with remainder to B, and that the form of words he has chosen for this purpose merely reflects his distorted conceptions of the law governing limited interests.

But though it appears highly probable that misconceptions of this kind exist in a large number of cases in which the testator has made a gift of "what remains," it will normally be uncertain whether they existed in any given case. In any event, in order to determine what the testator meant, we are restricted to an examination of the words he used. And if those words are read as showing an intention to give A absolute ownership of a given fund and then to cause whatever may remain of that fund on A's death to go over to B, it becomes impossible to fit the interests which the testator intends to create into any categories recognised by English law. In fact, this literal interpretation has been adopted in a number of cases and in all of them it has been held that A becomes absolutely entitled, that the gift over is void, and that B consequently takes nothing.

Repugnancy and Uncertainty

This result has been reached by two different routes. In one class of case it has been held that the attempted disposition of what remains on the death of the first taker is void as being repugnant to —that is, inconsistent with—the absolute interest given to him in the first place. Thus in *Perry* v. *Merritt* [15] the testator gave all his personalty on trust for his wife for her absolute use and benefit, and after her death he gave all the money remaining after payment of her debts to certain legatees: it was held that the gift was in substance one of the money remaining after what the wife had thought proper to spend during her lifetime, and that it was bad as being repugnant to the absolute interest given to the wife. The basis of this and similar decisions [16] appears to be the principle that, if property is given to A absolutely, it is a necessary incident of the interest given to A that on A's death whatever remains undisposed of must pass under his will or on his intestacy: any attempt to sever the incident from the absolute interest by prescribing a different destination for what remains at A's death must therefore fail. In another class of case, the gift over of what remains on the death of the first taker has been regarded as an attempt to

[15] (1874) L.R. 18 Eq. 152.
[16] See, for instance, *Henderson* v. *Cross* (1861) 29 Beav. 216; *Re Wilcock's Settlement* (1876) 1 Ch.D. 229.

impose a trust on the absolute interest given to him. In such cases the explanation given for the invalidity of the second gift is not repugnancy but uncertainty: the court applies the well-known principle that in order to create a valid trust the property subject to the trust must be ascertained, and it holds that that requirement is not satisfied since it is impossible to say what part, if any, of the property given to the first taker will remain on his death. This type of reasoning is particularly appropriate where the gift of what remains is in the form of a direction to the first taker to leave by will, as in *Pushman* v. *Filliter*,[17] where the testator gave his residuary estate to his wife and desired her at his death to dispose of what should be left amongst their children. It appears to have been taken for granted that the words used were sufficiently imperative to create a trust, but it was nevertheless held that the wife took an absolute interest because the subject-matter of the trust was not sufficiently certain. The ground of uncertainty may also be relied on where the whole disposition is in the form of a gift in trust, as in *Bull* v. *Kingston*,[18] where personalty was given to a trustee in trust for A for her separate use with an unlimited right of disposal by will, but if A died without a will, the testator continued, "I give all that may remain of my fortune at her decease to" another beneficiary: it was held that the gift over failed for uncertainty of subject-matter.

The authorities referred to, and others, show that where a disposition in a will is properly construed as a gift of "what remains" on the death of a prior absolute owner, that disposition will, by one mode of reasoning or another, be held as a matter of law to be void.[19] It follows that a gift over of "what remains" can only be held to be valid if the disposition of which it forms part is given some construction which takes the gift over out of the rule of law in question, which frees it, that is, from the taints of repugnancy and uncertainty.[20]

One possibility at once presents itself. The gift over might be regarded as cutting down the absolute interest of the first taker to a

[17] (1795) 3 Ves. 7.
[18] (1816) 1 Mer. 314.
[19] See *Re Sheldon and Kemble* (1885) 53 L.T. 527, *per* Kay J.
[20] *Ibid.*

life interest. It is clear that where a gift of property to A which is in terms absolute is followed by a gift of the same property to B on A's death, A prima facie takes a life interest and B an interest in remainder; the absolute gift to A is regarded as being cut down by the subsequent gift to B.[21] But the question is whether a gift over to B of "what remains" ought to be treated as equivalent for this purpose to a gift over of the whole of the property comprised in the initial gift to A. The common-sense answer appears to be that prima facie it cannot: if the testator has done no more than give over to B what remains on A's death, one would think that it would be impossible to treat him as having given over the whole of the property initially given to A, unless the context contains further words showing that that was his intention.

There are some cases in which the context unquestionably shows that he had such an intention. Thus, the interest given to A may be coupled with words conferring on A a power to dispose of capital during his lifetime. Now it is settled law that a testator may validly give property to A for life, with remainder to B, coupled with a power for A during his lifetime to take all or any part of the capital for his own use, or to dispose of it by deed or will, or the like. Thus, in *Pennock* v. *Pennock*[22] the testatrix appointed property in trust for her husband for life "with power to take and apply the whole or any part of the capital for his own benefit," and with a gift over on the death of the husband: it was held that the husband took a life interest coupled with a power of appointment over capital in his own favour, and that the gift over took effect on his dying without exercising the power. In *Re Richards*[23] there was a gift in similar terms and the life-tenant exercised the power by appointing all the capital of the property to himself: it was held that the appointment was valid.

Now where the testator has made a gift to A which is in terms absolute, but has then gone on to confer an express power to take or dispose of capital on A, and to give what remains on A's death to B, the natural inference is that he intended to make the sort of

21 See *Sherratt* v. *Bentley* (1833) 2 My. & K. 149; *In b. Lupton* [1905] P. 321.
22 (1872) L.R. 13 Eq. 144; *Re Thomson's Estate* (1880) 14 Ch.D. 263 is similar.
23 [1902] 1 Ch. 76; *Re Ryder* [1914] 1 Ch. 865 is similar. See also *Re Shuker* [1937] 3 All E.R. 25; *Re Lawry* [1938] Ch. 318.

disposition that is exemplified in *Pennock* v. *Pennock* and *Re Richards*, that is, to give A a mere life interest coupled with a power of disposition and to give B an interest in remainder after the termination of A's life interest. For, in the first place, the conferring on A of a power over capital points to the conclusion that A is not intended to take an absolute interest, for if the testator had so intended no power would have been necessary. And the fact that B is given "what remains" on the death of A is readily explained by the presence of the power: the testator obviously intended B on A's death to take the property given to A or whatever might be left of it after the power had been exercised. The gift to B is in effect a gift over of the capital subject to the exercise of the power, and as such it is sufficient to cut down A's absolute interest to a life interest.

These conclusions have in fact been drawn by the courts in deciding cases in which the gift to the first taker, in terms absolute, was coupled with a power over capital. Thus, in *Re Stringer's Estate*,[24] the testator gave his estate to X, with full power to sell and dispose thereof, but in case X should not dispose of the estate or any part thereof the testator gave the same or such part thereof as he should not dispose of to Y for life with remainders over. The Court of Appeal held that the gift to X must be read as a gift to him for life, with an absolute power of appointment and with a gift over to Y in default of the exercise of the power of appointment.[25]

But suppose there is no power and nothing else in the context to show affirmatively that the first taker is intended to take a mere life estate: is it then possible to avoid the conclusion that where property is given to A absolutely, with a gift over of what remains to B, the testator means what he says, with the result that A takes

[24] (1877) 6 Ch.D. 1 (C.A.).

[25] See also *Re Pounder* (1886) 56 L.J.Ch. 113; *Re Sanford* [1901] 1 Ch. 939. In *Re Jones* [1898] 1 Ch. 438, where an absolute gift to the testator's widow was followed by the words "so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose" of the testator's estate, and there was then a gift over of what remained on the widow's death, Byrne J. held that the words quoted did not create a power in the true sense, but merely indicated the object of the testator in making the absolute gift, that the wife took absolutely and that the gift over was void.

absolutely and the gift to B is void? Logically, as pointed out earlier, there is no escape from this conclusion: but the courts have in a number of cases of this type held that the gift over of "what remained" on the first taker's death should be treated as a valid gift over of the whole fund which cut down the interest of the first taker to a mere life interest. Thus, in *Constable* v. *Bull*[26] the testator gave all his estate to his wife for her sole use and benefit and directed that at her decease whatever remained of his estate should go to certain specified persons: Knight-Bruce V.-C. held that the wife took a mere life interest with remainder to the persons named in the will. A similar conclusion was reached in *Bibbens* v. *Potter*[27] by Hall V.-C. and in *Re Sheldon and Kemble*[28] by Kay J., and a more recent decision, *In the Estate of Last*,[29] is to the same effect. It is not too much to say that in none of these cases was there any real indication in the wording of the gift itself or of the context that the testator intended the first donee to take a mere life interest.[30] Where reasons are given for the judgments in these cases, what they amount to is that when one looks at the will as a whole the natural inference is that the testator intended to give the first donee a mere life interest with remainder to the second donee. This reasoning is not easy to follow: what is called looking at the will as a whole seems to be a euphemistic expression for guessing at the testator's meaning and disregarding those of his words which are not consistent with one's guess. But the decisions are there, and cannot be disregarded.

Lack of a Rule of Construction

The position is therefore that if a testator gives property to A in terms which would ordinarily confer an absolute interest, and then goes on to give B what remains on A's death, and there is nothing

[26] (1849) 3 De G. & S. 411.
[27] (1879) 10 Ch.D. 733.
[28] (1885) 53 L.T. 527.
[29] [1958] P. 137.
[30] In *Re Sheldon and Kemble*, note 19, *supra*, Kay J. thought that something turned on the fact that the ultimate gift was not of "what may remain at the decease of my wife" but that the words used were "at the decease of my wife what may remain." It is difficult to see that this could possibly make any difference.

in the context to throw any further light on the testator's intention, the court may either treat the testator as meaning what he has said, in which case A will take absolutely and the gift over to B will be void for repugnancy, or come to the conclusion that the testator's intention was to give A a life interest with remainder to B, in which case the will will be construed accordingly. There is no rule of construction determining which of the two possible interpretations the court should choose: it is at liberty to adopt either of them. And it is impossible to predict with any degree of certainty what the court will do: no legal materials exist on which to base a prediction. Thus, wherever a testator makes a will containing a gift in the form under consideration (a thing which, as I have pointed out, quite often happens), anyone who is interested and asks for advice about the interpretation of the will can only be told: "There are two possible meanings and only the court can say which is the right one. You must apply to the court."

Now this situation is obviously unsatisfactory. Where a set of circumstances is of common occurrence, the law ought to provide a solution for the legal problem to which it gives rise, so as to prevent litigation with its attendant expense, and to avoid the appearance of injustice which is inevitable where essentially similar cases are decided in different ways. In the type of case under consideration, none of these difficulties would occur if a firm rule of construction were adopted. What that rule ought to be is a question of secondary importance. Probably the better course would be to adopt a rule which treated dispositions of the sort under discussion as giving the first taker a mere life interest, and the second taker an absolute interest in capital, in remainder expectant on the preceding life interest. If the conjecture put forward earlier as to the mental processes of testators who make this kind of gift was justified, the suggested rule would carry into effect the intention of the testator in the majority of cases; it would also have the merit of not excluding the second taker, whom the testator obviously must have wished to benefit in some way, from participating in the gift. But it would be better to have a rule the effect of which would be to give the capital absolutely to the first-named donee than to have no rule at all, as at present.

Whichever rule might be adopted, its operation would no doubt to some extent be arbitrary; one could not be sure of its giving effect to what the testator intended. But as matters now stand, any solution which the court may adopt is equally arbitrary in the sense that no one can be sure of its giving effect to what the testator intended: while in addition it has the disadvantage of being unpredictable.

It is perhaps undesirable to attempt to found any very positive or detailed conclusions on the examination of only two types of case: but it does at least appear when the two are compared that rules for the construction of wills do not, as some of the critics seem to suppose, invariably produce interpretations which are at variance with the testator's clearly expressed intention, and that the lack of a firm rule of construction does not necessarily make easier the task of determining that intention.

CONSTRUCTIVE TRUST— VENDOR AND PURCHASER

Donovan Waters

The contract of sale as a current legal problem may seem an odd notion. Surely, reflection suggests, few areas of the law have been so fully thought out and firmly established. Yet, from the point of view of equity, this is hardly true. There has certainly been a great deal of thought and there is indeed an abundance of authority, but the constructive trust between vendor and purchaser still produces a steady flow of authority, its exact nature is still the subject of text-book submissions, and recently it was at the centre of an action which ultimately led to a division of three to two in the Lords.

The form and extent of the conversion produced by the constructive trust might well be re-examined, but it is the object of this paper to argue more fundamentally that the constructive trust between vendor and purchaser is a current legal problem that should never have existed. Not only is the constructive trust a superfluous concept in the sense that the vendor/purchaser relationship could always have been contained adequately within the law of contract, but its existence has led to no conceptual development in the law of sale, and it has in fact created problems which otherwise would not have existed. Perhaps it is now too late to reject a doctrine which has been with the law of trusts from the beginning, but it does seem that, if the complete unproductiveness of this doctrine can be established, the courts might be encouraged to phrase the contractual situation less often in the vaguely analogous and misleading language of trust.

The Nature of the Constructive Trust

Today it would be recognised that the purpose of imposing a trust relationship upon parties is purely to provide a remedial device. A, a fiduciary of B, is in possession of realty or personalty which

ought to be in the hands of B. If equity would recognise the circumstances as validly giving rise to the obligation of restitution, then the trust relationship is imposed and the full panoply of the trust concept, depending upon the exact nature of those circumstances, is available to B. Where the remedies of common law and statute law are adequate, however, it is clearly idle to introduce the trust, and so much is recognised today. But this has not always been so; sometimes the trust has grown merely as the remedial device of an alternative jurisdiction. The constructive trust in its application to the vendor and the purchaser is as old as the law of trusts; indeed, its origin is to be found in the implied use which at the beginning of the sixteenth century was understood to arise in favour of B when A bargained and sold lands to B.[1] When the law of trusts evolved in the first quarter of the seventeenth century it was, therefore, settled practice for courts of Chancery to regard the vendor as conscience bound towards the purchaser, and in 1651 it is already taken as well established that upon the execution of the contract the purchaser acquires an equitable estate in the land sold.[2]

From the beginning, however, some courts of Chancery were aware of the boundless nature of the implied trust. In 1676 Lord Nottingham is saying,[3] "following the earlier decisions," "[t]he law never implies . . . a trust, but in case of absolute necessity." If it were not so, "a way is open to the Lord Chancellor to construe or presume any man in England out of his estate." A similar inhibition can also be found in the interpretation of the constructive trust between vendor and purchaser. The language employed is the language of trust, but the law applied is the law of contract as evolved in the common law courts, and courts of Chancery are anxious not to break across the established laws of contract.

This, then, was the enigma of the trust. How far was the

1 See Holdsworth, *History of English Law*, Vol. IV, p. 424. In *Irebey* v. *Gibone* (1579) Cary 82-83 V had bargained and sold an estate for value to P, and delivered to P a deed of feoffment. Before livery and seisin, however, V leased to C, who knew of the sale to P. The court granted an injunction to P on the grounds of the constructive notice in C.

2 *Lady Foliamb's* case, cited in *Daire* v. *Beversham* (1661) Nel. 76.

3 *Cook* v. *Fountain* (1676) 3 Swanst. 585, at p. 592.

rapidly developing law concerning trusts of express and implied intention to take with it the trust which equity imposed upon a common law doctrine having a mere analogy with trust relationships?

It is fairly clear that the basis of the equitable conversion was soon founded in the availability of specific performance; counsel in *Atcherley* v. *Vernon*[4] in 1725 regards this as well established, and Lord Parker giving judgment appears to treat this statement as incontrovertible. But the real controversy was to develop not in regard to the foundation of the imposed trust, but rather over the secondary question as to the moment at which the trustee/beneficiary relationship arose. In this way the essential futility of the trust analogy was masked by the fact that the concept was accepted; the questioning which should have concerned its essential validity became concerned with its mode of operation. The result has been that the basic problem of the vendor/purchaser trust has been continually fought on the wrong issue. The trust of express or implied intention on the one hand, and the imposed trust having its basis in contract on the other, are in fact incompatible. The express or implied trustee should not be, and is not, concerned with personal interests in the trust property[5]; the vendor-trustee is much concerned, and that concern endures until the purchase-money is paid. Since it is usual in the case of realty for conveyance to coincide with such payment, the moment of true trust analogy, therefore, is in fact momentary.[6] And the contract for the sale of personalty offers even less scope for the true trust concept.[7] Effectively, the essential incompatibility between the position of the trustee and the vendor before completion has reduced discussion over the moment at which the trust arises to what might be termed a linguistic merry-go-round. For the problem is insoluble and insoluble it remains.

[4] (1725) 10 Mod. 518, at p. 527.

[5] Even as a trustee-beneficiary.

[6] The constructive trust has remained principally with the sale of realty, rather than of personalty, due to the delays in completion caused by the need to establish title to realty.

[7] Right to sell and guarantee of quiet possession are terms of the contract, and contract and delivery will often coincide in time.

The Moment at Which the Trust Arises

1. *The earlier views*

The early courts were quite content to adopt the reasoning that, as with the bargain and sale, the trust arose on the execution of the contract. In 1702, in *White* v. *Nutts*,[8] Lord Keeper Wright stated without question that "in each case, in equity, the estate is conveyed from the time of the articles sealed," and the reporter of this case notes at some length that this time and theory of conversion is now well established. A little later in 1727 there is evidence of the extension of this reasoning to the public sale. If the trust arises at the moment of the execution of a private contract of sale, then it ought also to arise at the moment when the court confirms the purchaser as the best purchaser in the case of a public sale. "Also from the time of the report confirmed absolutely, the estate is bound, and the party who was to convey is become but a trustee for the purchaser, who ought to have the money ready." [9]

The first questioning of the prevailing opinion appears to have come from Lord Hardwicke. In *Mackrell* v. *Hunt* [10] the purchaser had purchased in an auction, and the court had subsequently confirmed the purchase. Later, however, the vendor failed to prove his title, and this led his lordship to remark that, as until the title was proved or accepted by the buyer, the buyer could be discharged of the purchase, "to call him owner till he has accepted the title would be an absurdity." [11] Indeed, Lord Hardwicke required not only acceptance of title but the money being brought into court before he was prepared to say that the trust had arisen. And this opinion was, of course, strictly correct because until both these things were done not only could the purchaser withdraw, but the vendor would retain a security interest in the subject-matter of the sale. On a later occasion Lord Hardwicke repeats his argument. In *Hinton* v. *Hinton*,[12] the vendor having died before conveyance,

[8] (1702) 1 P.W. 61, at p. 62.
[9] *Ex p. Manning* (1727) 2 P.W. 410, *per* The Hon. John Varny M.R.
[10] May 25, 1749, reported as a note to (1816) 2 Mod. 34.
[11] *Ibid.* at p. 37.
[12] (1755) 2 Ves.Sen. 631.

a question arose as to the purchaser's position, and his lordship said [13]:

> "If the contract is prepared on the part of the purchaser, or if he has done all that is necessary on his part, the court considers things contracted to be done for valuable consideration, as done, and considers the other as trustee from the time he ought to have performed."

This subsequent opinion was phrased more vaguely than the first, but in *Hinton* v. *Hinton* Lord Hardwicke went on specifically to say that, if (and only if) these conditions were present, would the rules concerning express trusts then apply.

During Lord Eldon's long and dogmatic Chancellorship, the views of Lord Hardwicke in this respect were no longer echoed. Lord Eldon accepted the earlier views that the trust arises on the contract being executed, and the cases of this period are more concerned with the extent of the purchaser's equitable interest. On at least three occasions [14] Lord Eldon points out that from the moment of contracting until his death before completion, or until the agreement should break off, the purchaser is capable of devising the estate, "as being in equity the owner." [15] "They are [his premises] to all intents and purposes." [16] He could sell them, charge them and encumber them; they were assets and would descend to his heir.

2. *Sir Thomas Plumer's views*

The scene was now set for the nineteenth-century debate. The real controversy over the vendor's trusteeship was to commence as a result of this long preceding period of unanalytical dogmatism, and in particular with the views of Sir Thomas Plumer M.R. The Master of the Rolls accepted the now firmly established view that trusteeship arises at the moment of contracting, but candidly admitted in *Acland* v. *Gaisford* [17] that he had "not found any

[13] *Ibid.* at p. 634.
[14] *Paine* v. *Meller* (1801) 6 Ves. 349; *Seton* v. *Slade* (1802) 7 Ves. 265; *Broom* v. *Monck* (1805) 10 Ves. 597.
[15] (1805) 10 Ves. 597, at p. 606.
[16] (1801) 6 Ves. 349, at p. 352.
[17] (1816) 2 Mad. 28, at pp. 31, 32.

authority which determines what is to be done with the Estate during the interval when the Title is under dispute." Until he had been paid, he said, the vendor was as clearly entitled in equity to possession as the purchaser was equitable owner of the estate. Indeed, the purchaser would be a trespasser *quoad* possession. It was this contradiction in the position of the parties which led him to say in *Wall* v. *Bright* [18]:

> "The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate."

Though all this was demonstrably true, it inevitably implied that, prior to the purchaser's payment and completion, whatever the vendor was, he was not a trustee. Moreover, if the so-called constructive trust arose at the moment of contracting, it was an entity of its own, subject to its own peculiar rules, and to compare it with the concept of the express trust was merely to confuse the issue as to the real equitable nature of the vendor/purchaser relationship, and to consign that nature to the unproductive analysis of it being, as it were, a mere square peg in a round hole.

The Master of the Rolls appears to have realised the misuse of the word "trust"; for while he says, after the words quoted above,[19] "[t]here are these essential distinctions between a mere trustee, and one who is made a trustee constructively, by having entered into a contract to sell," at another part he says [20]:

> "Before it is known whether the agreement will be performed, [the vendor] is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and providing nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay."

[18] (1820) 1 Jac. & W. 494, at p. 503.

[19] *Ibid.* "The contract to sell is a disposition of the estate, and by it the vendor parts with his right and dominion over it. It is in equity no longer his; he is considered constructively to be a trustee of the estate for the purchaser, and the latter as a trustee of the purchase-money for him. They are so considered by construction only" (at p. 500).

[20] *Ibid.* at p. 501.

These two statements are irreconcilable except on the basis that the "constructive trust" arises on payment and acceptance of title, while the phrase "a trustee constructively" refers to "a trustee *sub modo*." However, this reconciliation assumes an odd use of terms and also involves the conclusion that the constructive trust can only arise when the vendor assumes the role of naked trusteeship, that is, when he is both under a duty to convey and no longer retains a beneficial interest in the property sold. But whatever Plumer M.R. meant, it was now evident that the exact relationship between trusteeship *sub modo* and constructive trusteeship was to remain as an additional issue of contention.

A further difficulty with this judgment arose from the fact that Plumer M.R.'s trusteeship *sub modo* was itself based upon a misconception. For it was, and remains, by no means true that "a mere trustee is a person who not only has no beneficial interest in the property, but never had any, and could, therefore, never have contemplated a disposition of it as his own." [21] Indeed, it is unfortunate that Plumer M.R. opened himself to criticism on this point, for this case, *Wall* v. *Bright*, marks the first real judicial effort to grapple with the elusive character of the trusteeship said to exist between contract and completion. Evidently the embarrassment to Plumer M.R. was that he could see no effective trust relationship until title was accepted and payment had been made, but was forced to adhere to the time-honoured notion that a trust arises upon contract.

3. *Sir Richard Kindersley's view*

A little later in *Dawson* v. *Solomon* [22] Kindersley V.-C. fared no better. In his view, commenting upon the instant facts,

> "from the date of the contract the vendors became trustees of the property, the beneficial interest remaining in themselves until . . . the date fixed for completion; and from that day (supposing the contract should happen not to be completed), the legal estate still remaining in the vendors, they were trustees for the purchaser, in whom the beneficial interest then was

[21] *Ibid.*
[22] (1859) 1 Dr. & S. 1.

from that day, and thus the relation of trustees and *cestuis que trust* was constituted between them." [23]

Plumer M.R. had been prepared to concede that the purchaser's ownership between contract and title acceptance plus payment was "inchoate and imperfect," [24] but Kindersley V.-C. seemed to be denying that it existed before the date fixed for completion, despite the fact that later he specifically said that the relation of trustee and *cestui que trust* was so far constituted that the purchaser had become in equity owner of the premises. By "beneficial interest" he must have meant possession and the fruits of possession, and it is to be noted that he apposes the phrases "trustees of the property" and "trustees for the purchasers." The deduction is that Kindersley V.-C. saw the vendors as trustees for themselves until the date fixed for completion. And even after that date the relation of trustee and *cestui que trust* was only "conditional and *sub modo*" until title had been made out and the purchase-money paid; only after these last events could one "with implicit confidence reason merely from the law which would prevail as between a mere ordinary trustee and *cestui que trust*." [25]

By 1860, therefore, there were at least three views upon when the constructive trust arose. The traditional view was that the trust arose, and therefore conversion operated, as at the moment of contracting. The second and third views could not deny in view of this tradition that trusteeship of some sort arose at that time, but each was concerned with the defeasibility of the interest which the contracting purchaser gained, and the consequent indeterminacy of the interest which the contracting vendor retained. The conception of "trust" as opposed to contract led directly to the second view that the constructive trust arose when the title was made out or accepted and the purchase-money paid, though in some irrational way conversion had already taken place in expectation of those events. The same conception led to the third view that, if a completion date had been fixed, at that date the constructive trust arose, though, should actual completion have been delayed, it

[23] *Ibid.* at p. 9.
[24] (1820) 1 Jac. & W. 494, at p. 502.
[25] (1859) 1 Dr. & S. 1, at p. 10.

remained a trust *sub modo* until title acceptance and price payment. It was not clear whether the third view recognised the traditional moment of conversion as also the moment of origin of the purchaser's equitable ownership (both moments being in expectation of the constructive trust date), or if it insisted that the equitable ownership arose with the trust on the date fixed for completion.

Moreover, to add to the confusion, the facts of a case may well make it difficult to determine the moment at which the court sees the constructive trust as arising. In *Holroyd* v. *Marshall*,[26] for example, Lord Westbury stressed that the traditional view rests upon the availability of specific performance.

> " A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance,"

and at the same time, " the vendor becomes a trustee for the vendee." In *Rose* v. *Watson*,[27] however, where vendor and purchaser had agreed to a lump sum down and remainder at interest over a period of five years, Lord Westbury said:

> " Where the contract undoubtedly is an executory contract, in the sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in performance of that contract is a part performance and execution of the contract, and, *to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership* of a corresponding portion of the estate." [28]

It would have been clearer had his lordship said on the earlier occasion that at the moment of the contract a defeasible beneficial interest passes, an interest which becomes indefeasible on the payment of the purchase-money or part thereof.[29]

[26] (1862) 10 H.L.C. 191, at p. 209.
[27] (1864) 10 H.L.C. 672, at p. 678.
[28] Italics supplied.
[29] Such payment constituting also an acceptance of the title, provided the contract is silent on the point.

4. *Lord Hatherley's views*

In 1870, however, the doubts which remained after Plumer M.R.'s judgment in *Wall* v. *Bright* came to a head in *McCreight* v. *Foster*.[30] In this case the vendor had received part of the purchase-price at the time of contracting, but the purchaser, prior to paying the balance, had agreed to assign the benefit of the contract to a third party, if called upon so to do. The third party informed the vendor of this arrangement, but after the date fixed for completion the purchaser paid the balance, took a completion, and assigned to a fourth party. On the insolvency of the purchaser, the third party sought to impugn the vendor for completing without notifying the third party, and a question arose as to the extent of the trusteeship imposed upon a vendor.

In reversing Romilly M.R., Lord Hatherley L.C. said[31]:

> "It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and *cestui que trust* does, in a certain sense, exist between vendor and purchaser; that is to say, when a man agrees to sell his estate, he is trustee of the legal estate for the person who has purchased it as soon as the contract is completed, but not before."

Now completion clearly referred to actual conveyance, and, since Lord Hatherley was following Plumer M.R.'s earlier judgment, it was not clear whether the Lord Chancellor was speaking of the mere or naked trusteeship, the constructive trusteeship, or the trusteeship *sub modo*. On further appeal to the House of Lords,[32] Lords Chelmsford, Cairns and O'Hagan were content to follow the traditional view that trusteeship arises "when the contract of sale is signed by the parties,"[33] "subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property,"[34] and Lord Hatherley was forced on to a defensive role.

[30] (1870) L.R. 5 Ch. 604.

[31] *Ibid.* at p. 610.

[32] *Sub nom. Shaw* v. *Foster* (1872) L.R. 5 H.L. 321. Lord Cairns followed the familiar line of thought that the trust arose at the moment of contracting because it was later shown that the contract was valid. The title was good and had been accepted.

[33] *Ibid.* at p. 333, *per* Lord Chelmsford.

[34] *Ibid.* at p. 338, *per* Lord Cairns.

He agreed in the House of Lords [35] that it was firmly established that,

> "the moment . . . a contract for sale and purchase is entered into and the relation of vendor and trustee is constituted, the vendor becomes a constructive trustee for the vendee. It is but a constructive trust."

But, having thus confused the constructive trust and the trust *sub modo* which Plumer M.R. had dubiously distinguished, the Lord Chancellor was in some difficulty to show that he had merely followed Plumer M.R.'s reasoning. He confirmed that, in referring to completion in the court below, he had meant actual conveyance, but explained the whole sentence by saying that that was what Plumer M.R. meant by progressing towards mere trusteeship.[36] In this way it became clear that on the earlier occasion Lord Hatherley had not been discussing the constructive trust or trust *sub modo*, largely and equally clearly because prior to completion he considered trust language to be inapposite to the legal relationship of the parties. The remainder of the Lord Chancellor's judgment in *Shaw* v. *Foster* effectively makes this point. Paraphrased it would read: "You must not impose a trust relationship until payment of the purchase-price obligates conveyance, because the trust concept must not impede the ordinary contractual relations of the parties."

5. *Sir George Jessel's views*

It was with this ill-disguised disagreement at the highest level over the value of trust language to the vendor/purchaser relationship that Jessel M.R. four years later came to give his often-quoted judgment in *Lysaght* v. *Edwards*.[37] The issue of the pre-completion relationship was squarely raised, since, following contract and purchaser's acceptance of title, the vendor had died, having earlier devised to X all real estate vested in himself as trustee. Did the estate in dispute pass to X or to the heir-at-law? Jessel M.R.'s

[35] *Ibid.* at p. 356.
[36] Lord Hatherley's apologia runs, "for the words are his and not mine." (*Ibid.* at p. 356.)
[37] (1876) 2 Ch.D. 499.

view was that the trust arose not when the parties entered into the contract but when there proved to be a valid contract. By this he declared that he meant a contract binding on both parties, that is, a contract where there is "no ground whatever for setting it aside as between the vendor and purchaser." [38] In the case of realty the moment of valid contract arose when the vendor made out his title, or the purchaser accepted title. On the other hand, it was clear that Jessel M.R. was complementing this view with the additional notion that once the constructive trust arose it related back to the moment when the contract was entered into, and to substantiate this as the operative moment the Master of the Rolls referred to the judgments of *Shaw* v. *Foster*.

In the course of his judgment, however, Jessel M.R. carefully considered Plumer M.R.'s earlier opinion in *Wall* v. *Bright*, with which, despite some criticism, he found himself in approximate agreement. It will be recalled that Plumer M.R. referred twice to the "constructive trust" in such a way as to appear self-contradictory. Jessel M.R.'s judgment in effect reconciles those two statements by showing that in Plumer M.R.'s view a trusteeship *sub modo* arose on the parties contracting, a trusteeship which ripened into constructive trusteeship (with retroactive effect to the moment of contracting) when the title was made out or accepted, and the purchase-money paid. It was at this point that Plumer M.R.'s judgment had contained another difficulty, for under his reasoning the constructive trust [39] arises at the moment when it could in fact be termed a mere trust, the vendor no longer having a beneficial interest in the property sold. Jessel M.R. solved this difficulty by disagreeing with Plumer M.R. The constructive trust did not require the making out or acceptance of title *and* payment of purchase-money. It required only the first; at that point the parties were bound, and conversion therefore operated, whatever the subsequent fate of the contract due to the purchaser's inability to pay. On this basis the constructive trust ripened into mere trusteeship when the purchaser paid, and the vendor no longer had a lien upon the property sold.

[38] *Ibid.* at p. 507.
[39] Ignoring for the moment its retroactive effect.

Lysaght v. *Edwards* certainly succeeded in laying to rest many of the doubts which surrounded *Wall* v. *Bright* and subsequently *Shaw* v. *Foster*, but it raised again the inherent weakness of the trust concept in its application to the sale relationship. Jessel M.R. was himself guilty of inexact language. Plumer M.R. had said that until completion the ownership of the purchaser was "inchoate and imperfect; it is in the way to pass, but it has not yet passed."[40] Jessel M.R. disagreed with this: "I cannot treat this as law. The ownership has passed the moment the contract is made, *if valid*."[41] But the fact remained that on reflection Jessel M.R. would surely have conceded that while the trusteeship is merely *sub modo* the equitable ownership of the purchaser is certainly inchoate and imperfect, being defeasible. Prior to the making out or acceptance of title, the ownership can only be regarded as having passed if the purchaser can be compelled to accept the title, even if it is imperfect. Once again a Chancery judge was guilty of overlooking the fact that the constructive trust does not arise at the moment of contracting, but that, if it does eventually arise, it has retroactive effect to this time. There was a further evident weakness. By determining that the constructive trust arises upon the making out or acceptance of title, Jessel M.R. was led to the conclusion that, though the sale subsequently fails to go through because payment is not made and the vendor's equitable interest in possession is therefore enlarged once again to full legal and equitable ownership, conversion nevertheless takes place for the purposes of the vendor's and purchaser's estates. This was precisely the point which Plumer M.R. and Lord Hatherley appear to have had in mind. The only result of applying the trust concept before there had been performance by the purchaser was possibly to work an illogical conversion, and for no other trust rule to apply.

6. *The dissension in Rayner* v. *Preston*

All this illogicality came to a head in 1881 in *Rayner* v. *Preston*.[42] The issue this time was different from *Wall* v. *Bright*

[40] (1820) 1 Jac. & W. 494, at p. 502.
[41] *Ibid.* at p. 518. Italics supplied.
[42] (1881) 18 Ch.D. 1.

and *Lysaght* v. *Edwards*; the court was not concerned with the moment of conversion for the purposes of deceaseds' estates, but with what property was subject to the constructive trust. If the property was burnt down between contract and completion, who took the insurance moneys? Once the constructive trust arose and was related back to the moment of the parties' contracting, did it not follow that the vendor-trustee could not withhold any benefit which he had gained in relation to the trust property? On this question the Court of Appeal divided, and the nature of the division well reflects the anomalies of the constructive trust. Cotton L.J. adopted the view that the unpaid vendor is a trustee, thereby following Jessel M.R.'s analysis, but concluded that he is trustee of the property "contracted to be sold." [43] This did not include rents received prior to completion, and the only reason for this conclusion appears to be that not the trust but the terms of the contract govern the parties' relationship.

James L.J., on the other hand, gave a full-blooded judgment demonstrating the logical conclusion of the application of the trust concept. He was convinced that "the relation between the parties was truly and strictly that of trustee and *cestui que trust*," and that, once the trust has related back, it is shown that from the beginning "the beneficial or equitable interest was wholly in the purchaser." [44] He went on [45]:

> "Whenever that state of things occurs, whether by act of the parties, or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*. This being the relation between the parties, I hold it to be a universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner."

[43] *Ibid.* at p. 6.
[44] *Ibid.* at p. 13.
[45] *Ibid.*

Even on this basis, however, James L.J. had to concede that the trust property did not include the benefit of collateral contracts, and his dissent was purely on the grounds that a contract of fire insurance between vendor and third party was not collateral. Here again the language was of trust but the prevailing rules were entirely contractual.

Equally forcible was the judgment of Brett L.J., who, though agreeing with Cotton L.J. on the collateral character of the fire policy, disagreed with both Cotton and James L.JJ. on the application of the trust concept. Once there is a trust, he said, though it arise because of the availability of specific performance, "all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee."[46] Yet one observed that this was not the case, said Brett L.J. There might never be a conveyance, so that the trust was not relevant, and, if there were acceptance of title and a readiness to pay, so that the trust related back to the moment of contracting, the law insisted that rents and profits till completion were the vendor's. In what way, then, could the vendor/purchaser relationship be described as a trust?

Brett L.J.'s judgment was the simple *exposé* of the incompatibility of the trust to the vendor/purchaser relationship. And, oddly enough, this was the last in the line of nineteenth-century cases which had wrestled with the problem of the exact nature of the trust. The passing of the Locke-King Acts[47] and the Conveyancing Act, 1881, removed much of the fruitful ground for litigation, and the problem which had begun in confusion came to an effective halt in controversy. The debate had proved as sterile as its commencement had augured. The doctrine, however, curiously survived. Since 1881 the courts have been prepared to state, simply as an established fact,[48] that the constructive trust arises when the parties contract, but that the trust only exists if specific performance would

[46] *Ibid.* at pp. 10, 11.

[47] Real Estate Charges Acts, 1854, 1867, 1877.

[48] The general equitable principle has nearly always been raised with a judicial reluctance. In *Central Trust and Safe Deposit Co.* v. *Snider* [1916] 1 A.C. 267, at p. 272, Lord Parker introduced the principle with the remark, "It is often said that . . . ," and repeated this the following year in *Howard* v. *Miller* [1915] A.C. 318, at p. 326.

be granted. In any event, it is said, the trust must not be pressed too far.[49] In this way the courts appear to have resigned themselves to maintaining the constructive trust as a fairly meaningless, but harmless, *introit* to judgments based upon contractual construction.

The Unproductiveness of the Trust Concept

There is not one field into which the constructive trust between vendor and purchaser has entered, and into which it has brought a development in conceptual thinking or a new range of legal remedies. Each of these fields might have been selected for closer examination, but within the confines of this paper one only can adequately be examined. The case of *Oughtred* v. *I. R. C.*[50] is the most recent manifestation of the unproductiveness of the trust concept, and the remainder of this paper will be devoted to the problem raised by the constructive trust in the sale of an equitable interest.

Constructive Trust and the Law of Property Act, 1925, s. 53

Section 53 (1) (*c*) of the Law of Property Act, 1925, provides that the disposition of an equitable interest already in existence at the time of the disposition must be in writing signed by the person disposing of the interest or his agent authorised in writing or by will. Subsection (2) qualifies subsection (1) by saying that the section does not affect the creation or operation of resulting, implied, or constructive trusts.

So far this discussion has been principally concerned with the contract for the sale of realty, since this *par excellence* is the field of the constructive trust. But, as Lord Westbury pointed out in *Holroyd* v. *Marshall*,[51] the doctrine also applies to the contract for the sale of personalty, "provided that the latter [is] such as a court of equity would direct to be specifically performed." It also

[49] See, *e.g.*, *Re Watford Corpn. and A. S. Ware's Contract* [1943] Ch. 82, at p. 85. If the nature of the constructive trust, as opposed to the moment of its originating, had been at all in the minds of the courts since the seventeenth century, the cases would demonstrate a consistent line of reasoning on the principles governing the availability of specific performance. As they stand, the cases would be confusing to the most ardent theorist.

[50] [1960] A.C. 206.

[51] (1862) 10 H.L.C. 191, at p. 209.

applies, therefore, to the contract for the sale of an equitable interest in personalty, and this was the problem which was raised for the first time in *Oughtred* v. *I. R. C.*

Oughtred *v.* I. R. C.

The facts are simple enough. Under a settlement of certain shares X had a life interest and Y the remainder absolute. On June 18, Y agreed orally with X that on June 26 he would exchange his remainder interest with X in return for other shares, owned by X, to the intent that X's life interest should be enlarged into absolute ownership. On June 26 the documents were executed. First, a deed of release to the trustees of the settlement, secondly, a transfer of X's shares to nominees for Y with a consideration of ten shillings, and, thirdly, a transfer of the settled shares by the trustees to X. The Inland Revenue Commissioners claimed that under the Stamp Act, 1891, s. 54, the transfer of the settled shares was an "instrument . . . whereby any property, or any estate or interest in any property, *upon the sale thereof* is transferred to or vested in a purchaser," [52] and that duty therefore arose assessable on the value of the shares transferred to X. X claimed that no duty was recoverable as Y's interest passed to her by the oral contract for value on June 18 and that the disputed transfer of June 26 was not therefore an instrument "upon the sale thereof."

1. *Before Upjohn J.*

At first instance [53] the constructive trust enabled X to succeed against the Inland Revenue. Upjohn J. was of the opinion that on the making of the oral agreement for value (equivalent to a contract of sale) Y became a constructive trustee of his equitable reversionary interest for X, that no writing was needed for the sale and purchase of personalty other than chattels real, and that section 53 expressly excepted constructive trusts. In Upjohn J.'s view the disputed transfer of the legal estate was not on sale, but on the winding up of the trust and the release of the trustees. This last conclusion was, perhaps, unfortunate, and in the House of

[52] Italics supplied.

[53] [1958] Ch. 383.

Lords Lord Jenkins attacked it, for undoubtedly the disputed transfer might no less have been "upon the sale" because it was also a winding up and release. It seems more likely, however, that Upjohn J. was hardly committing such an error as saying in fact that, the oral agreement having resulted in the equitable transfer of the equitable interest (and what fuller transfer could there be), there was nothing left for the disputed transfer to do other than wind up the trust and release the trustees.

2. *In the Court of Appeal*

In the Court of Appeal, on the other hand, the case took a curious turn. For the court, Lord Evershed M.R. thought that the question was "what is the true nature and intended purpose of the instrument sought to be charged." [54] And, since the oral contract was "to the intent that" the life interest should be expanded into absolute ownership, his lordship read the transactions of the 26th as the contemplated method of completion of the oral contract. On this basis the disputed transfer was "on the sale thereof" and duty arose. The curious note about the conclusion, however, is the construction of the oral contract of the 18th and an example may serve to demonstrate this curiosity.

If Y had contracted to sell his reversionary interest in Blackacre "to the intent that X should become absolute owner of Blackacre," would he not at once have become a trustee of that interest for X? The constructive trust arises by operation of law, and is not, therefore, affected by the intent of the parties. A vendor of freehold estate intends that his purchaser shall have the freehold ownership, but this does not prevent equity from imposing a constructive trust upon the parties from the moment of the exchange of contracts. In this way, upon contracting, Y would hold his reversionary interest in Blackacre as trustee for X. In addition to his equitable ownership of his life interest, X would now have a defeasible equitable ownership in the reversionary interest, the defeasibility being removed upon Y's proof of equitable title and X's delivery of the consideration. Now this analysis is not changed

54 [1958] Ch. 678, at p. 688.

if Blackacre is replaced by the settled shares of *Oughtred's* case. The Court of Appeal must, therefore, have been proceeding on the basis that the declared intent of the parties attracted stamp duty to the disputed transfer regardless of whether or not a constructive trust arose on the 18th, and Y consequently had everything or nothing to transfer on the 26th.

In any event the effect of this construction was that Upjohn J.'s judgment on the constructive trust became irrelevant, and was not discussed except for Lord Evershed's unexplained remark in passing that the court was not prepared to accept Upjohn J.'s conclusions on the effect of section 53.[55] But, one may ask, if, as Upjohn J. thought, the disputed transfer was not the completion of the sale since a constructive trust arose on the 18th, how could the trust fail to be excepted under subsection (2) from the operation of section 53?

Indeed, even with the Court of Appeal judgment taking the lines it did, the true effect of the oral contract of the 18th is left in doubt because of Lord Evershed's remarks later in his opinion. "Immediately prior to the transfer (and the other contemporary documents)," he said,[56] "[X] had not got (as, in my view, she had not) the entire beneficial interest . . . immediately after the transfer [she] had the whole legal and beneficial interest in her shares." This sentence raises a fundamental question. If the oral contract was only completed on the 26th, as the Court of Appeal thought, then, the court might have inferred, nothing could pass under it until the contract was complete. If, on the other hand, and despite completion on the 26th, the oral contract of the 18th did in fact make Y a constructive trustee of his equitable interest for X, and the disputed transfer completed the contract in the sense of conveying the legal estate, then on the 18th X acquired as *cestui que trust* Y's equitable interest, and, therefore, surely, the full equitable interest in the shares. It therefore comes to this. If, after the oral contract, X had the full beneficial interest in Y's equitable interest, it is obviously difficult to appreciate Lord Evershed's meaning that, prior to the disputed transfer, X "had not got

[55] *Ibid.* at p. 687.
[56] *Ibid.* at p. 689.

. . . the entire beneficial interest." [57] And it is the more difficult to appreciate his lordship's meaning in view of the court's construction of the oral contract. If that contract was only completed on the 26th, then surely it better follows that neither legal nor equitable interest passed until the 26th.[58]

The simple point is whether on the 18th a constructive trust arose or it did not. The Court of Appeal judgment does not answer this query; neither, therefore, does it explain why a constructive trust did not arise, nor, in the alternative, if some sort of constructive trust did arise, what form it took.

3. *In the House of Lords*

In the House of Lords four judgments were delivered, and each raises its own problems.[59] Lord Radcliffe agreed with Upjohn J.'s reasoning. The oral agreement, he thought, created an equitable interest in the reversion in X, and Y thereupon became a trustee *sub modo*. Subsection (2) did not prevent the creation of this constructive trust, so that on payment of the consideration by X on the 26th Y became "in a full sense and without more the trustee of his interest for [X]." [60] X was then "the effective owner of all outstanding equitable interests," [61] no equity could be asserted against her, and, therefore, she did not need to call for a written assignment from Y. Of course, it followed, as his lordship said, that after the 18th Y had no authority to order the trustees to transfer the shares because after the 18th the trustees held the trust fund for X absolutely.

This line of reasoning presents the converse of the problem inherent in Lord Evershed's judgment, for it appears to imply that the specifically enforceable oral contract for the sale of an equitable

57 What could Y retain after the 18th as constructive trustee of an equitable interest? Neither Lord Evershed nor Lord Radcliffe pursues this point.

58 Lord Evershed remarked (*ibid.* at p. 688) that the court had "found difficulty in appreciating the answer to [the] objection" that the trustees could not have passed Y's equitable reversionary interest since it was never vested in them. He preferred to say instead (at p. 690) that the trustees conveyed the shares "with all rights and interests attached." One is inclined to agree with Lord Radcliffe, who later suggested that this was description, not analysis.

59 Lord Keith concurred in Lord Jenkins' judgment.

60 [1960] A.C. 206, at p. 227.

61 *Ibid.* at p. 228

interest in personalty is equivalent in effect to an equitable assignment. Moreover, if this reasoning is valid, it applies to the specifically enforceable contract, whether oral or written, for the sale of an equitable interest in personalty or realty. But is it valid? A declaration of trust is by definition not an assignment, though it is possible to contend on the authority of *Re Chrimes*[62] that a direction to trustees by the beneficiary that they should now hold for a third party operates as an assignment of a reversionary interest.[63] In *Grey* v. *I. R. C.*[64] Evershed M.R. thought that "on the whole" a direction to trustees was "distinct, not only in form but also in substance, from an assignment," that a direction to trustees was more closely analogous to a declaration of trust, and that it was fundamental that a declaration of trust was not an assignment. The result of a direction to trustees (and, *a fortiori*, a declaration of trust) is "to defeat or override the pre-existing beneficial rights" of the director or declaror.[65] No assignment takes place. On the same grounds the imposition of trust upon the vendor does not create an assignment, and in *Oughtred's* case the oral contract did not create an equitable assignment.[66]

It seems, therefore, that there is an essential contradiction in Lord Radcliffe's judgment. Y's equitable interest may have been defeated or overridden by the constructive trust, but, even after X's payment of the consideration on the 26th when Y became a trustee "in a full sense,"[67] Y must have been trustee of something. If his beneficial interest passed on the 18th, and his lien came to a close on the 26th, so as to make X thereupon "the effective owner of all outstanding equitable interests,"[68] what was the subject of Y's trusteeship? The clue to the contradiction lies in the word "effective," for Lord Radcliffe says later that "there was, in fact,

[62] [1917] 1 Ch. 3.
[63] See *Grey* v. *I. R. C.* [1958] Ch. 690, at pp. 712, 713, where Lord Evershed did not dissent from *Re Chrimes*, but was able to distinguish and restrict its authority. This point was not referred to in the Lords.
[64] [1958] Ch. 690, at p. 710.
[65] *Ibid.* at p. 711. On the grounds that "disposition" in s. 53 (1) (*c*) was wider than in the Statute of Frauds, s. 9, Lord Evershed's judgment was not supported by his brethren or by the House of Lords.
[66] Unless, quite independently of the imposed trust, a vendor inherently demonstrates an intention to assign.
[67] [1960] A.C. 206, at p. 207.
[68] *Ibid.* at p. 228.

no equity to the shares that could be asserted against [X]." [69] This suggests that until the trustees conveyed the shares to X, Y retained some undefinable interest in the equitable reversionary interest; the absolute equitable ownership of X was only due to the estoppel which lay against Y.[70] But, since the equitable interest was never transferred to the trustees, and an equitable interest is an entity distinct from the property subject to it, it is still a disputable problem as to what, if anything, the vendor of an equitable interest retains after contract, and how he discharges his trust.[71]

The compatibility of the constructive trust and the sale of an equitable interest is carried no further by Lord Cohen's dissenting judgment. Lord Cohen also thought that a constructive trust arose on the 18th, but differed from Lord Radcliffe in thinking that section 53 (1) (*c*) applied. As a result of this application Y "could not assign that equitable interest to [X] except by a disposition in writing." [72] At this point Lord Cohen added that the trustees could not transfer the equitable interest because it was never vested in them. X acquired absolute title after the disputed transfer, he said, because Y, the constructive trustee, was estopped, after his receipt of X's consideration, from disputing the title. This judgment, it will therefore be observed, not only failed to describe how the reversionary interest got from Y to X, but also omitted to explain why section 53 (2) did not apply. If a constructive trust arose on the 18th, and subsection (2) expressly excepts the creation or operation of "constructive trusts" from the section, what does subsection (2) mean? No answer is supplied by Lord Cohen, nor is one conceived by the writer.

In a short judgment Lord Denning broadly followed Lord Evershed's argument below. The equitable interest was not conveyed to X direct or to the trustee; Y authorised the trustees to convey the interest "by way of enlarging her life interest into absolute

[69] *Ibid.*

[70] A realisation of this unsatisfactory conclusion may have been at the root of Lord Evershed's hesitancy in the Court of Appeal.

[71] Where other limited equitable interests in the same property remain outstanding, the vendor will have no reason to direct the trustees to convey the property to the purchaser. Does he discharge by granting, when called upon, a written assignment? If so, what has he left to assign?

[72] *Ibid.* at p. 230. "Assign" appears to be used loosely; no explanation of the use of the word is forthcoming.

ownership." [73] "By the transfer so made by his authority, she acquired his reversionary interest as effectively as if he had conveyed it direct to her." [74] With respect, this judgment does not carry the problem any nearer to a solution. Moreover, it adds another. Lord Denning agreed with Lord Cohen that, while section 53 (1) (*c*) made writing necessary, "section 53 (2) does not do away with the necessity." [75] Again no explanation is forthcoming, unless Lord Denning for his part is to be understood as implying that no constructive trust arose on the 18th. This itself is not clear; his lordship considered it unnecessary "to embark on a disquisition on constructive trusts." [76]

In Lord Jenkins' view,

> "if the subject-matter of a sale is such that the full title to it can only be transferred by an instrument, then any instrument [the parties] execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale, notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract." [77]

Since the declared intention of X and Y was that X should have absolute ownership of the settled shares, the disputed transfer was clearly "on the sale thereof." And so the leading majority judgment solved the litigated problem.

In the circumstances it would be idle to debate whether Lord Jenkins impliedly considered the nature of the constructive trust of the 18th. Suffice it to say that his lordship preferred the view that the effect of the oral contract of the 18th was to cause the reversionary interest so to pass to X that it merged with her life interest and produced an absolute interest in possession. If, of course, such a merger took place then it follows that nothing of the equitable reversionary interest could have remained in Y after the 18th, but his lordship did not pause to consider the effect of this conclusion upon the analysis of the possible constructive trust; indeed, this was more than unfortunate in view of the enigma demonstrated and not solved by the other judgments. The interest of this

[73] *Ibid.* at p. 233.
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.* at p. 241.

judgment is, therefore, left surrounding the discussion on the irrelevance of the constructive trust.

In his own words, his lordship did not know that it had ever been held that the "proprietary interest of a sort"[78] which in equity a purchaser gains upon contracting prevents the subsequent transfer of the property in performance of the contract from attracting stamp duty. Clearly the whole matter was too fundamental to be argued. It is to be noticed, however, that in all the examples Lord Jenkins gives[79] of situations where stamp duty arises, the vendor remains constructive trustee of a legal interest: the sale of land by contract and subsequent completion, the sale of shares by contract and subsequent actual transfer entitling registration, and the sale (by the sole beneficiary?) of investments in a trust fund by oral agreement and subsequent transfer.

4. *Conclusion*

So the questions remain. Can a constructive trust arise on the sale of an equitable interest? And, if it can, does it prevent a subsequent instrument of transfer (for example, a written assignment) from attracting duty? The courts have been said to have given no lead on this, and the ratio of *Oughtred* v. *I. R. C.* might seem to confirm this. But I would submit that the course of *Oughtred's* case, and the directness and implications of Lord Jenkins' judgment suggest strongly that the constructive trust has entered the field only to confuse its operation. The truth of the matter is that the constructive trust, assuming as it does a division of legal and equitable interests, is irreconcilable with the sale of an equitable interest, and, further, that, even when the division exists, the courts have little hesitation in ignoring the constructive trust's implications where those implications are not actually denied. It is not without interest that Lord Jenkins held the constructive trust irrelevant on the ground that he did not know that it had ever been held to be relevant. Perhaps the significance of a doctrine can indeed be measured when a Lord of Appeal can infer that its irrelevance need rest on no better ground than that, like Topsy, it just growed that way.

[78] *Ibid.* at p. 240.

[79] *Ibid.*

FRUSTRATION OF A PROMISE TO MARRY

RAPHAEL POWELL

SAVE for the licence of the editors I may be a trespasser in this series on *current* legal problems. Few actions for breach of promise of marriage reach the courts, though, for all I know, many may still be started but settled out of court. It would be better if the action were abolished altogether as a contractual action, though it might well remain as an action in tort. In effect that is the solution of the French *code civil*.

In Roman law, the idea of a legally binding engagement fell into disuse as marriage and divorce became more free.[1] An attempt was made to enforce the marriage promise indirectly by means of a stipulation for a penalty if the marriage did not take place; but Paulus, at any rate, thought that such a stipulation was not in accord with *boni mores*.[2] Under Christianity, however, a changed attitude towards marriage and divorce led to the introduction of penalties for breach of promise.[3] A practice had been borrowed from the East whereby one party to the engagement, usually the man, would give to the other party *arra sponsalicia*, *i.e.*, a betrothal gift in earnest of the seriousness of his intentions. If he broke off the engagement, he would forfeit the *arra*. If the other party broke off the engagement, a multiple of the *arra* would have to be paid to the party wronged. However, Roman law also allowed certain justifications for breach.

Modern French law, abhorring any restriction on complete freedom of marriage, has followed the Roman law principle and does not regard a promise to marry as an enforceable contract, though indirectly it may have certain legal consequences.[4] No damages are recoverable by a jilted party, therefore, merely because the promise has been broken. But if, after his promise, Johnny

[1] Corbett, *Roman Law of Marriage* (1930), p. 14.
[2] D.45.1.134 pr.
[3] Corbett, *op. cit.*, pp. 18–23.
[4] Planiol et Ripert, *Traité pratique de droit civil français* (1952), Vol. II, pp. 70–71.

does some wrong to Frankie, which causes her loss, she has an action against him for damages, though it is still not clear whether this is an action for civil delict or for an abuse of rights.[5]

In English law, breach of promise of marriage was a matter for the ecclesiastical courts down to the latter part of the seventeenth century. The temporal courts then began to exercise jurisdiction on the ground that marriage was a temporal benefit. In 1926, it became possible for McCardie J. to say that, within comparatively recent times, " actions for breach of promise had been clothed with the more obvious features of commercial disputes." [6]

In Roman law, the party in breach could not be compelled to marry, but that was only because the Roman law probably never allowed specific performance of any promise. The Canon law, however, allowed specific performance. The words used in the ecclesiastical judgment were described by McCardie J. as " rigorous and significant." [7] " Sentence for matrimony, commanding solemnisation, cohabitation, consummation and tractation, as becometh man and wife to have." So, too, under some of the old state laws of Germany specific performance could be obtained. This is no longer possible in German law, though an action for damages is allowed.[8] The Dutch jurist Voet tells us that in Roman-Dutch law a marriage promise could be enforced by civil imprisonment. Further, by order of the judges, a marriage could be ordered even through a servant of the court as a proxy for the recalcitrant promisor.[9] In England, since a statute of George II,[10] specific performance of a marriage promise cannot be ordered. The common law remedy for breach now lies only in damages for breach of contract, though the damages awarded may, in appropriate circumstances, be vindictive.

It may be thought that, if the law can compel engaged parties to marry and live together as man and wife by an order for specific

[5] *Ibid.* See also P. O. Lapie, " The Present State of French Case-Law with Regard to Damages for Breach of Promise of Marriage," 11 (*3rd series*) *Journal of Comparative Legislation* (1929), p. 68; E. S. Amos and F. P. Walton, *Introduction to French Law* (1935), p. 55; J. Lefebvre, *Le problème de la rupture des fiançailles ou promesses de mariage en jurisprudence* (Thèse, Dijon, 1935).
[6] *Cohen* v. *Sellar* [1926] 1 K.B. 536, at 545.
[7] *Ibid.* at p. 543.
[8] E. J. Schuster, *The Principles of German Civil Law* (1907), p. 185.
[9] Voet, 23.1.12.
[10] 26 Geo. 2, c. 33.

performance, greater attention will be paid by jurists to possible justifications for breach of promise of marriage. Certainly the most extensive treatment of these justifications is to be found in works of jurists published at a time when, and a place where, specific performance was possible. That is true, in England, of Swinburne's *Treatise of Espousals* (1686). Voet lived from 1647 to 1713; his *Commentaries* deal very fully with the subject. Then there is a lengthy and detailed discussion in the work of a Roman-Dutch lawyer in 1714—Henricus Brouwer's *De Jure Connubiorum*.

However, as Professor Hahlo has pointed out in his excellent essay on this subject, " even the indirect restraint which an award of damages involves, should not be resorted to, unless the repudiating party can be said to have acted without good reason." [11] That is even more true where damages may be vindictive or a penalty can be awarded. So we find that the Roman legislators specified the justifications for relief from the penalties relating to *arra sponsalicia*.[12] There are relatively few cases in the British Commonwealth and the United States, but the factors are too uncontrolled to warrant any conclusion that British and American defendants take the consequences of their jiltings like gentlemen, or indeed any other conclusion whatsoever! Nor can we safely attribute to the gallantry of their French counterparts the paucity of cases in French law. It is interesting to observe, however, that the Chinese civil code of 1929, although it provided for nothing more than simple compensation to the jilted plaintiff, specified eight grounds for dissolving an agreement to marry as well as the more general ground " where other grave reasons exist."

When is a Marriage Promise Frustrated?

We shall reserve the specific grounds of frustration, real or alleged, until later. Here we are concerned with the fundamental question —What do we mean by frustration? We rarely meet questions of statutory frustration, though of course that could happen wherever legislation made marriage between certain classes of persons illegal

[11] H. R. Hahlo, " Breach of Promise Actions in Modern Law," 63 *South Africa L.J.* (1946), p. 379, at p. 386.
[12] C.5.1.5; C.1.4.16; C.1.3.56.

or void. Our main concern, then, is the occurrence, after the promise of marriage, of some circumstance which frustrates the performance of that promise. That bare statement at once raises a number of problems.

(1) *Is a promise to marry performed merely by going through the marriage ceremony?*

In *Hall* v. *Wright* [13] the defendant pleaded that by reason of a disease he was incapable of marriage without great danger to his life and was therefore unfit for the married state. In the Exchequer Chamber, Baron Watson pointed out that the term "incapable of marriage" might mean two things—either incapable of going through the marriage ceremony, or incapable of performing the functions required in the marriage state.[14] On either view he thought that the defendant's plea was good. Some of the judges in this case, however, seemed to think that, as long as the defendant could get through the marriage ceremony without risk to his life, he could not say that he was incapable of marriage. Lord Campbell C.J. said that even if the plaintiff could not become the mother of his children, at least "she might have become affectionately attached to him, and might have innocently desired to enjoy the *consortium vitae* with him; she might have obtained rank and station in society as his wife; and, as his widow, she might have become dowable of his lands." [15] With greater cynicism, Willes J. said that even if the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. "I do not sympathise with such a woman, if any there be," he said, "but this is not a question of sentiment." He went on to refer to a woman who might be willing to be "the companion and the nurse, if she could not be the mistress of her sweetheart." [16] However, in the American case of *Allen* v. *Baker* [17] the court believed that it was contrary to the understanding of men

[13] (1859) E.B. & E. 746, 765.
[14] *Ibid.* at p. 773.
[15] *Ibid.* at p. 763.
[16] *Ibid.* at p. 786. The same view will be found in an *obiter dictum* by Montague Smith J. in *Boast* v. *Firth* (1868) L.R. 4 C.P. 1, at p. 8.
[17] (1882) 41 Amer.Rep. 444.

generally that the acquisition of property or social position either does or should be a main and independent motive and inducement for entering into marriage promises.

Differing from his brethren in *Hall* v. *Wright*, Baron Watson pointed out that in the church marriage service the parties declare that there is no lawful impediment to the marriage, "and that with reference to the object and purpose of the marriage" there stated. Those purposes in the Church of England service are the procreation of children, the avoidance of fornication, and mutual society, help and comfort in prosperity and in adversity. How then could the parties in this case make such a solemn declaration without a falsehood?[18] Baron Bramwell put the case of a man who said to the woman: "I have promised to marry you and will, but will never live with you or treat you as a wife." Such a man would not be offering, but refusing, to perform his promise. In 1916, a similar point of view was put forward by the majority of the court in a case in Iowa—*Re Oldfield's Estate, Bowie* v. *Trowbridge*.[19] They put two extreme cases of a healthy party to an engagement turning up, on the day fixed for the wedding, at the deathbed of the other party, and demanding that the marriage be not only solemnised but also consummated.[20] What a sham it would be if the dying party entered into the ceremony with the thought: "I know quite well I shall not live to carry out all the things I am promising."

It is submitted, however, that we must have regard to the purposes of marriage which the parties would have contemplated as ordinary sensible thinking persons. If any of those purposes would be regarded as fundamental to the subsistence of the marriage, its frustration puts an end to the promise of marriage. Normally those purposes would be those which are stated in the marriage service appropriate to the religion of the parties, or those which are understood by ordinary people to be the usual purposes of marriage. But clearly there must be exceptional cases. For example, who could suppose that the procreation of children was a purpose contemplated

[18] (1859) E.B. & E. 746, 765, at p. 774.
[19] 156 N.W. 977 (1916).
[20] *Ibid.* at pp. 985–986.

by two seventy-year-old parties to an engagement? And surely there must be some hesitation in attempting to suggest the purposes contemplated by the mutual marriage promises of a wealthy octogenarian and a young girl of twenty. Perhaps they alone know.

Nevertheless, in all cases we are concerned not only with the marriage ceremony but also with the marriage itself, that is, the life of the parties after the ceremony. As a result we have what seems to be a paradox, where Jack promises to marry Jill. Jack fulfils his promise by going through the marriage ceremony, whatever rights Jill may have if Jack fails to carry out his duties as a husband. But, if we have to decide whether the promise has been frustrated, we must look, not merely to Jack's ability to go through the marriage ceremony, but also to his ability to fulfil the purposes of the marriage itself.

(2) *Can a marriage promise be held frustrated on grounds of public policy?*

So far we have used as our norm the probable contemplation of the parties as sensible thinking persons. But of course the judge does not ask them what they would have contemplated. He puts himself into their position as sensible thinking persons. However, sensible persons may think, not only of themselves, but also of the public welfare. It should follow that the judge also ought to consider the public welfare. The grounds of frustration held valid by the courts show many signs of this attitude, especially when the possible effects of a marriage on the children are considered.[21]

How far can a court go in this respect? In the American case of *Parks* v. *Marshall*[22] Ruth, aged nineteen, became engaged to Ben, a fairly rich young man at Western Military Academy. A number of medical men and others gave evidence later that Ben was a moron of inferior or unstable mentality and a moral defective, though apparently he could drive a car fast and well. The girl had admitted to one witness that she was only marrying Ben for his money, that she detested the thought of living with him, but that,

[21] See, *e.g.*, *Gamble* v. *Sales* (1920) 36 T.L.R. 427, *per* Darling J.; *Allen* v. *Baker* (1882) 41 Amer.Rep. 444, at p. 445, *per* Ruffin J.; *Shepler* v. *Chamberlain*, 197 N.W. 372 (1924), at p. 373, *per* Fellows J.

[22] 14 S.W. 2d 590 (1929).

as he was a heavy drinker, maybe he would not last very long, and besides it would be embarrassing to back out of the marriage now. Judge Davis said that " the parties to a marriage include the woman, the man, and the State." The State was vitally interested in the physical and mental welfare of its citizens, and the State was interested in forestalling the birth of mental defectives. Therefore it was the policy of the State to discourage marriages where that result was probable or likely to occur. But the judge also suggested that Ben had a complete defence because, on the evidence, Ruth could no longer enter into the marriage with a genuine intention to love, cherish and respect Ben.

(3) *What is meant by frustration in relation to marriage promises?*

Are there any broad general principles which underlie the causes of frustration which have been upheld or alleged?

In *Hall* v. *Wright*[23] Erle J. said[24]: " The principle to be deduced from these cases seems to me to be that a contract to marry is assumed in law to be made for the purpose of mutual comfort; and is avoided if, by the act of God or of the opposite party, the circumstances are so changed as to make intense misery instead of mutual comfort the probable result of performing the contract."

Such general statements are rare in the cases, however, and we have to look within the periphery of the court's treatment of the specific cause. Writers of treatises and articles also tend to concern themselves with specific causes. That is certainly true of Swinburne, Pothier, Brouwer and Voet. But Voet also refers more generally to any fact inconsistent with the aims of marriage, to " things of which the presence or absence interferes wholly or partially with the aims of marriage or with its anticipated harmony and happiness."[25]

In 1946 Professor Hahlo wrote that a party may put an end to the betrothal if and after the engagement " some substantial change occurs in the condition, circumstances or qualities of the other

[23] (1859) E.B. & E. 746, 765.
[24] *Ibid.* at p. 755.
[25] 23.1.15.

party, which jeopardises the prospects of a successful marriage." [26] A broader statement appeared in the *Harvard Law Review* of 1903 [27]:

> "In contracts for personal services incapacity either of body or mind is an excuse for not performing. . . . It would seem that the conditions implied in ordinary personal contracts should be extended rather than restricted in a contract so thoroughly personal in its nature as the marriage compact. To every contract of marriage might well be coupled the implied condition that a refusal to perform shall be justifiable if the situation of the parties has so changed, without fault on the part of the defendant, that a consummation of the married state would be impossible or would endanger the life of either."

(4) *In considering questions of frustration, should marriage promises be treated differently from other contracts?*

When *Hall* v. *Wright* came before the courts in the middle of the last century there was relatively little authority on the subject. Lord Campbell C.J. therefore inclined towards the stringent rule in *Paradine* v. *Jane*.[28] He treated the marriage promise as absolute, and a person who makes an absolute promise has himself to blame if he does not guard himself by contract against impossibility of performance. Imagine putting an "excepted risks" clause or a "liability exemption" clause into a proposal of marriage! Some of the judges in the case, particularly Barons Watson and Bramwell,[29] did not agree with Lord Campbell and thought that a marriage promise was conditional upon physical ability to perform it, and by and large that is the general view of the courts in the later cases I have found in England, Scotland, South Africa, Canada and the United States. But even in this century the tendency has reappeared occasionally in the United States. In *Smith* v. *Compton* [30] Judge Van Syckerl thought that a marriage promise was absolute. Judge Salinger, the only dissenting judge in

[26] *Loc. cit.*, at p. 383.
[27] 16 Harv.L.R. (1903), p. 604, at p. 605.
[28] (1647) Aleyn 26.
[29] (1859) E.B. & E. 746, 765, at pp. 775, 781.
[30] 52 A. 386 (1902).

Re Oldfield's Estate,[31] tried to carry the view of the majority *ad absurdum*. He said[32]:

> "If one has spectacles fitted and immediately thereafter becomes blind, is he excused from paying for the work and the glasses because an act of God has made them of no use to him? Will the amputation of both feet after ordering boots absolve from payment?"

The answer to these questions must surely be that the contracts are indeed frustrated, whether frustration depends on the idea of an implied condition or upon the happening of an unanticipated event which ought justly to discharge the parties. It is not even true to say that all commercial contracts are absolute, let alone contracts of so personal a nature as those mentioned by Judge Salinger.

In *Hall* v. *Wright* Pollock C.B. said[33]:

> "I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority."

Baron Bramwell tried to reach the same conclusion a little more seductively. Dealing with the promise to marry, he said[34]:

> "Consider how it is made, and how it is proved; made without formality, usually without witnesses, perhaps without the word itself being used, or any word of contract, an understanding between the parties rather than a bargain; come to, at least very often, in a state when feelings are much excited; proved by a variety of acts and conduct which assume the contract to exist. It seems unreasonable to deal with it as with a contract for sale of goods or other business transactions, though, no doubt, the same principle governs both."

One can almost hear the learned Baron's concluding sigh.

Nevertheless, however much we may shrink from the idea that a promise of marriage has anything in common with a commercial contract, broadly speaking most governing legal principles are the

[31] 156 N.W. 977 (1916).
[32] *Ibid.* at 990.
[33] (1859) E.B. & E. 746, 765, at p. 795.
[34] *Ibid.* at pp. 777–778.

same in both cases. It is true that, in marriage promises, as indeed in personal service contracts, we are more concerned with the continued quality of the parties rather than with the state of any material subject-matter of the contract. It is also true that, in considering the purposes of marriage, we are more concerned with prevailing social and ethical concepts than we should be if our contract were to secure delivery of a motor-car by a motor-dealer or a concert appearance by a well-known violinist. Apart from these factors, as long as we accept the principle that the continued effectiveness of a marriage promise is subject to the continuance of certain contemplated or recognised circumstances, we need not go much further than the ordinary rules relating to frustration of contracts.

Thus, first, in an ordinary contract, a temporary impossibility of performance may be, but is not necessarily, serious enough to discharge the contract. In the case of marriage promises, also, the courts have had to consider whether, for example, temporary disease or disability only defers the wedding day or completely frustrates the purpose of the marriage.[35] Secondly, in an ordinary contract, impossibility caused by a party is no ground for the discharge of that party on the ground of frustration. In the case of marriage promises, also, the courts have been astute in excluding disabilities produced by a party's own default, though it is not always easy to prove clearly whether a party has caused or contributed to his own disability.[36] Thirdly, the Law Reform (Frustrated Contracts) Act, 1943, does not exempt marriage promises from its operation.

The Causes of Frustration

Dr. Webber has written: "When frustration applies, a contract is not voidable but, at that moment, whether the parties know it or not, and whether or not they agree, the contract is dissolved." [37]

[35] See, *e.g.*, *Shuckleford* v. *Hamilton* (1892) 40 Amer.State Rep. 166, at p. 169, *per* Pryor J.; *Hall* v. *Wright* (1859) E.B. & E. 746, 765, at pp. 757–758, *per* Wightman J.

[36] *Hall* v. *Wright*, *supra*, at p. 757, *per* Wightman J.; *Shackleford* v. *Hamilton*, *supra*, at p. 171, *per* Pryor J.; *Allen* v. *Baker* (1882) 41 Amer.Rep. 444, at p. 447, *per* Ruffin J.

[37] G. J. Webber, "Frustration of Contract," 4 *Current Legal Problems* (1951), p. 282, at p. 298.

That is probably true of all commercial contracts and even of all personal service contracts. The reason may be partly one of principle, and partly the practical reason that the cause of frustration prevents all effective further performance of these contracts. In marriage promises, however, two factors make it difficult to accept Dr. Webber's statement without reservation.

(1) Even though a recognised cause of frustration exists, as, for example, a seriously incapacitating illness, the engaged parties may still decide to go on with the marriage. In many cases the marriage would be void and there would not even be a ground for its nullity. We could, of course, reconcile this fact with Dr. Webber's statement by suggesting perhaps that the decision to go on with the marriage is a new agreement based on the new state of facts existing at the time of the frustration of the original marriage promise.

(2) The cases do not always differentiate clearly between a cause for repudiation by one party and a cause of frustration of the whole contract. Of course, the same fact may often secure a double purpose; and sometimes the court may be saying only that what is sauce for the goose is also sauce for the gander. In *Re Oldfield's Estate*[38] Judge Gaynor said that either party can repudiate, whether for his own deficiency or for that of the other party. He gave as his reason that the giving and receiving of the consideration upon which the marriage is to rest are mutual obligations.[39] Article 976 of the Chinese civil code of 1929 declares that, where one betrothed party is found in one of the specified conditions, the other party may dissolve the agreement to marry. Professor Hahlo, as we have seen,[40] refers to the right of one party to put an end to the betrothal for just cause; but he goes on to say that the party whose condition has changed may himself or herself repudiate the espousals as long as the change has not been caused by his or her fault: "It is as if the *clausula rebus sic stantibus* formed part of every contract to marry."

Hall v. *Wright*[41] was the first English case in which a party tried to set up a defect in himself in an action for breach of promise

[38] 156 N.W. 977 (1916).
[39] *Ibid.* at p. 985.
[40] See above, note 26.
[41] (1859) E.B. & E. 746, 765.

of marriage. Sixteen years later, W. S. Gilbert's *Trial by Jury* was first produced at the Royalty Theatre. There, the defendant Edwin declaimed, while resisting the plaintiff's rapturous embraces:

I smoke like a furnace—I'm always in liquor,
A ruffian—a bully—a sot;
I'm sure I should thrash her, perhaps I should kick her,
I am such a very bad lot!
I'm not prepossessing, as you may be guessing,
She couldn't endure me a day;
Recall my professing, when you are assessing
The damages Edwin must pay!

Edwin alleged his defects only in mitigation of damages. George Wright asked for a complete discharge. During the course of argument for the defendant Martin B. said that "a man cannot himself set up as a defence that he is of a brutal temper."[42] Counsel replied that the reason was that he could not take advantage of his own wrong and so could not plead it. That suggests that we must differentiate between causes in respect of which the defendant is substantially culpable and causes for which he is in no way responsible—causes said in some cases to be due to the act of God or of law. I have already suggested that it is not always easy to decide whether or how far the cause is attributable to the defendant himself. That is particularly true in the case of some forms of physical or mental disease. Further, if the cause, looked at in the abstract, is to be regarded as a cause of frustration, or a ground for repudiation, the reason is that its existence is in fact likely to frustrate a purpose of marriage. That purpose is nonetheless frustrated because the defendant's own conduct is responsible for the cause, as, for example, where a man's own acts or neglects result in the contraction of an incurable disease which makes marriage impossible.

The attitude of the courts, however, is that he cannot in this latter case escape liability to pay damages. The sensible man in such a case will tell the woman of the disease and ask to be released from his promise. If she will not release him, his duty in

[42] *Ibid.* at p. 769.

English law is to marry the woman in spite of the existence of the disease. If the disease is venereal disease or mental disease, this is a ground for obtaining a decree of nullity. As far as I am aware, there is still no clear English decision that the mere fact that such a disease exists at all in one of the betrothed parties, whether due to the party's fault or not, completely frustrates the promise to marry. If the disease is neither venereal disease nor mental disease, there is no ground for a decree of nullity. But the problem remains if such a disease is incurable and is caused substantially by the defendant's own act or neglect. In the American case of *Allen* v. *Baker*[43] Ruffin J. tried to point a possible way out of the difficulty. He said[44]:

> "We cannot understand how one can be liable for not fulfilling a contract, when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself."

Certainly a contract is discharged if it becomes illegal to perform it. It remains to be decided that any contract whatsoever becomes discharged because its performance would be contrary to public policy or contrary to the prevailing moral standards. Even in *Allen* v. *Baker*, where the defendant pleaded that he had contracted venereal disease, the court was prepared to hold him liable if he had contracted the disease after promising to marry the plaintiff. But in *Shackleford* v. *Hamilton*,[45] another American case where the facts were similar, Pryor J. took a more objective line and suggested that it was the defendant's duty to abandon at once all idea of carrying out his promise to marry; and he doubted whether the defendant must still remain liable to pay damages in an action for breach of promise of marriage.

The present rule of English law is that impossibility caused by the promisor's own act or default is not an excuse for non-performance of his promise. That rule apparently still applies to marriage promises. Suppose, then, that the promisee refuses to release the promisor from his promise where he is suffering from a

[43] (1882) 41 Amer.Rep. 444.
[44] *Ibid.* at 445.
[45] (1892) 40 Amer.State Rep. 166.

disease, caused by his own act or neglect, which otherwise would have been held to frustrate the promise. The promisor has at any rate four options open to him:

1. He can offer a sum by way of settlement and hope that the plaintiff is not too much of a gold-digger or publicity-seeker to accept it.

2. He can defend an action for breach of promise of marriage and suffer judgment. It is to be hoped that such a course would prevent an award of vindictive damages against him and might even in appropriate cases permit mitigation of damages. But who can tell what will happen if a jury decides that it was " all his own fault "?

3. He can marry the woman. She may refuse to consummate the marriage. The continued existence of the cause of frustration will probably justify her in doing so, so that there will be no such wilful refusal as would give ground for a decree of nullity.

4. He can commit suicide or hope for an early death. In English law, at any rate, the action for breach of promise of marriage probably does not survive the death of a party to the betrothal.[46]

We come at last, if only briefly, to actual and alleged causes of frustration. Three points must be remembered:

1. We are concerned only with events which take place after the date of the marriage promise.

2. References to Roman law relate, not to frustration, but to justifications for cancelling the betrothal. References to the Chinese civil code of 1929 relate only to grounds for dissolution of the marriage agreement by one party because of something which happens to the other party.

3. We must sometimes be careful to distinguish between frustration and the right of repudiation.

We may group the causes under the following heads:

[46] In the Scottish case of *Liddell* v. *Easton's Trustees*, 1907 S.C. 154, and in the American case of *Re Oldfield's Estate*, 165 N.W. 977 (1916), the plaintiff was allowed to bring an action against the estate of the deceased.

(1) *Unchastity*

The defendant cannot allege his or her own unchastity as a ground for repudiation.[47] Unchastity of one party is only ground for repudiation by the other party, and of course, the other party is not bound to repudiate. The continued chastity of the woman is held to be an implied condition of the betrothal.[48] If there is an English case which decides that the man must remain chaste I have not found it. In Roman law the obligation was probably mutual.[49] Voet certainly accepts that for Roman-Dutch law[50]: he thought that it was grossly unfair that a man should demand from a woman a greater decency than he would himself be bound to display. The Chinese civil code of 1929 also gives a right to dissolve if either party has sexual intercourse with a third person. If both parties are unchaste, Brouwer suggested that the *culpa-compensatio* principle applied, so that neither could repudiate.[51] But Professor Hahlo doubts whether this would still be good law. If one repudiated, the other could hardly sue for damages.[52]

In a Canadian case, *G.* v. *B. and B.*,[53] there is an *obiter dictum* by Beck J.[54] urging the need for a more enlightened attitude in these days when men and women are co-educated and work side by side. He suggested that there is now no universal rule of law imposing an absolute implied condition of chastity. His views were accepted, with some reservation, by Ford J. in *Swyripa* v. *Vaculchik*.[55]

In Roman-Dutch law Brouwer thought that a man could repudiate his promise if the woman was ravished; but Voet goes into a lengthy argument against that view.[56]

(2) *Bodily disease*

Roman law texts mention only impotence. The Chinese civil code of 1929 referred to incurable serious disease, venereal and

47 *Hall* v. *Wright* (1859) E.B. & E. 746, 765, at p. 792, *per* Williams J.
48 *Ibid.* at p. 759, *per* Lord Campbell C.J.
49 C.5.1.5.3.
50 23.1.13. See *Stander* v. *Stander* (1929) A.D. 349, at p. 353, *per* Wessels J.A.
51 1.25.18.
52 *Loc. cit.*, at p. 380.
53 [1926] 1 W.W.R. 324.
54 *Ibid.* at pp. 330–331.
55 [1926] 3 W.W.R. 795.
56 23.1.14.

other loathsome disease, or permanent disablement. Swinburne gives foul disease (such as leprosy or the French pox) or some notable deformity (such as loss of the nose or an eye). Voet refers to leprosy or venereal disease; also incapacity to procreate, whether due to coldness, mutilation of the organs of generation or to a vicious state of mind. In *Hall* v. *Wright* the court never really dealt with the question whether impotence would frustrate the promise. In *Shackleford* v. *Hamilton* Pryor J. thought that it would do so. Of course it is a ground for a decree of nullity; but there is no overriding principle that everything which would be a ground for nullity necessarily frustrates a promise of marriage, although in *Hall* v. *Wright* there are remarks by Erle J.[57] and Watson B.[58] which suggest that they might have favoured such a principle.

In *Hall* v. *Wright* even some judges who would have recognised bodily disease as a cause of frustration attached conditions. We have already referred to the views of Erle J.[59] Wightman J. thought that the disease must produce the result that the promise could not be fulfilled without great danger to the life of one of the parties.[60] So did Baron Bramwell.[61] So also did the judges in the Scottish case of *Liddell* v. *Easton's Trustees*,[62] Pryor J. in *Shackleford* v. *Hamilton*[63] and Root J. in *Grover* v. *Zook*.[64] The disease in this last case, in *Hall* v. *Wright* and in *Jefferson* v. *Paskell*[65] was tuberculosis. In *Re Oldfield's Estate*[66] it was pernicious anaemia. In *Sanders* v. *Coleman*[67] the defendant suffered from three diseases of the urinary organs, any one of which would have been aggravated or made worse by marriage. In *Shepler* v. *Chamberlain*[68] the disease was cancer of the lower lip; but the evidence showed that it was curable, not communicable and probably not transmissible; there was no evidence that the condition would be aggravated or affected by marital relations, or that consummation of the marriage would hasten the defendant's death.

57 (1859) E.B. & E. 746, 765, at pp. 754–755.
58 *Ibid.* at p. 774.
59 See above, note 24.
60 (1859) E.B. & E. 746, 765, at p. 757.
61 *Ibid.* at p. 777.
62 1907 S.C. 154.
63 (1892) 40 Amer.State Rep. 166.
64 (1907) 120 Amer.State Rep. 1012.
65 [1916] 1 K.B. 57.
66 156 N.W. 977 (1916).
67 34 S.E. 621 (1899).
68 197 N.W. 372 (1924).

Our conclusions are that, whatever the rule of law ought to be, English law has not yet recognised that disease causing damage to the defendant's life is a cause of frustration. Most American decisions, however, and the views of several English judges do recognise its frustrating effect. There is sympathy for this point of view in the English cases of *Jefferson* v. *Paskell*[69] and *Gamble* v. *Sales*,[70] but they are not relevant to our point. Indeed, the former case suggests that the court would be more inclined to recognise disease as a cause of frustration if the defendant was alleging the plaintiff's disease; but the court, although it sometimes used the language of frustration, really decided that the plaintiff's illness gave the defendant a right of repudiation.

(3) *Mental disease*

Voet relies on D.24.2.4. for an assertion that Roman law recognised insanity as a ground for breaking an engagement; but that passage refers to divorce. Voet himself insists on somewhat long-continued insanity as a frustrating cause. In English law the judges who accept bodily disease as a frustrating cause mostly tend also to accept mental disease. In *Hall* v. *Wright* Lord Campbell C.J. would only concede that, if mental disease caused the man to become incapable of giving his assent in the celebration of the marriage, the woman could not sue him for breach of promise. In *Liddell* v. *Easton's Trustees*[71] the Scottish Court of Session, strongly opposing the views of the majority in *Hall* v. *Wright*, held that a woman could not recover damages from the testamentary trustees of a man who broke off his engagement because of a recurrence of an old depressive condition. He did in fact commit suicide in a mental hospital. The Lord Ordinary indeed said that the woman had had a very fortunate escape. Marriage would have caused a serious disturbance of the man's mental balance, she might have become the widow of a suicide, possibly the mother of his children, or in any case tied for life to an inmate of a mental hospital.[72]

[69] *Supra*.
[70] (1920) 36 T.L.R. 427.
[71] 1907 S.C. 154.
[72] *Ibid*. at p. 159.

We have already referred to *Parks* v. *Marshall*,[73] the American case where a defendant pleaded his own mental deficiency.

(4) *Brutality, violence and sundry kinds of bad manners*

Swinburne accepted cruelty as a ground for dissolving espousals if it was so severe that the other party dared not proceed in the match. Voet uses similar terms. In *Leeds* v. *Cook*[74] the plaintiff was the man. In his summing-up, Lord Ellenborough said *obiter* that, if the plaintiff had conducted himself in a brutal or violent manner and threatened to use her ill, the woman had a right to say that she would not commit her happiness to such keeping. In other words she could set up his brutality, violence and threats as a complete defence. There was no evidence, however, of such violent conduct, but the jury showed their dislike of the man's gross manners and lack of feeling towards the woman by giving him only a shilling damages. It should be noted that Lord Ellenborough's dictum does not suggest that violent conduct is a ground of frustration; it only gives the other party a right of repudiation. If a party tried to allege his own tendencies to violence or brutality, it would presumably be held that he cannot take advantage of his own wrong.[75]

In the Canadian case of *Grant* v. *Cornock*[76] the defendant alleged in justification that the woman who sued him fell into violent fits of rage with him; used coarse, obscene and profane language in private and in public, resorted to houses of improper character and sang obscene songs when in company with men. But Armour C.J. thought that this was not enough; the only misconduct which would justify his breach would be the woman's want of chastity, and that he did not allege. Presumably the man was expected to marry the woman first and then, if her bad manners continued and he could not control her, try to petition for divorce on some ground recognised by law.

[73] See above, note 22.
[74] (1803) 4 Esp. 256.
[75] See *Hall* v. *Wright* (1859) E.B. & E. 746, 765, at p. 769.
[76] (1888) 16 O.R. 406.

(5) *Miscellaneous causes*

Many other causes have been put forward at different times and in different places. The Roman legislators included a difference of religion or sect,[77] and entry into a monastery.[78] Voet was prepared to add apostasy in favour of Judaism, paganism or heresy; while Swinburne included all heresy, apostasy, or infidelity as examples of what he called "spiritual fornication." In the South African case of *Schnaar* v. *Jansen*[79] Tatham J. doubted whether the heresy of one party would justify the other in breaking off the engagement today.

The Chinese civil code of 1929 added uncertainty for over a year whether the other party was alive or dead. Swinburne includes three years' absence abroad or two years' absence within the province. The Chinese code also added imprisonment of the other party. In *Baddeley* v. *Mortlock*,[80] if the woman defendant could have proved the charges of dishonesty and perjury she made against the man who sued her, she would have been absolved from her promise. She could not; but curiously the judge allowed the existence of the rumour of the man's bad character to reduce the damages he claimed.

A South African court had to decide whether a defendant could successfully plead his discovery that one of his fiancée's uncles had been hanged for murdering his wife, another had married a native woman, while her brother had been convicted of housebreaking and theft.[81] The case is not relevant to our subject but an *obiter dictum* by Dove-Wilson J.P. may be relevant. He said that "if a man engages himself to a woman without having satisfied himself as to her relatives, he takes the risk of their being unsatisfactory."[82]

Voet included bankruptcy or an assignment to creditors. Pothier referred to a derangement of the man's fortune which rendered him unable to support the expenses of marriage. Professor Hahlo, however, submits that in modern law loss of property would not be a good ground for the repudiation unless caused by the recklessness or prodigality of the party concerned.[83]

[77] C.5.1.5.3.
[78] Novel 123.39.
[79] (1924) 45 N.L.R. 218.
[80] (1816) Holt 151.
[81] *Schnaar* v. *Jansen* (1924) 45 N.L.R. 218.
[82] *Ibid.* at p. 219.
[83] *Loc. cit.*, at p. 385.

Brouwer suggested loss of beauty of face or form of the woman as a result of accident or disease. "Beauty is in a woman what intelligence and strength of character are in man." [84]

Swinburne accepted as a ground for dissolving an engagement "some deadly enmity and unquenchable hatred" springing up between the parties.

Finally we have the general provisions. The Roman provision of Leo and Anthemius, to which we have been referring, added any other just cause of excuse. Swinburne finishes with "whensoever there is just and reasonable cause," though he "makes some doubt" of the lawfulness and reasonableness of "many more causes expressed in the Canon Law." Voet refers to "some other cause, sufficiently serious in the discretion of the judge." The Chinese civil code of 1929 mentioned "other grave reasons." I have found no suggestion that the *ejusdem generis* rule should be applied to these general provisions. In any case it may be difficult to discover what the *genus* is, without going back to the broad underlying principles to which we have already adverted.[85]

Whenever a newly-found alleged cause of frustration appears, however, we must ask ourselves several questions:

1. What is the reason for it?
2. Is it really a cause of frustration, or is it only a ground for repudiation?
3. Can the defendant use it to escape liability even where his own fault has caused the change in his own condition?

To sum up. The uncertainties of the English law on the whole subject suggest the existence of the following difficulties:

1. If the defendant is seeking to repudiate on the ground of a defect or changed condition in the plaintiff, he is expected in far too many cases to take the plaintiff for worse not only at the time of the marriage but even as early as the time of the engagement.
2. If the defendant is alleging his own defect or change of

[84] See Hahlo, *loc. cit.*, at p. 384.
[85] See above under sub-heading *When is a Marriage Promise Frustrated?*: (3) *What is meant by frustration in relation to marriage promises?*

condition, once it is shown that he is responsible for it, he cannot justify his refusal to go on with the marriage even though he may have realised quite sensibly that what he has done to himself makes him quite unfit to enter into the marriage. He must marry or pay damages.

3. Some grounds for repudiation might better be regarded as causes which frustrate a purpose of marriage altogether.

These are not current problems, except in the sense that they exist as long as the action for breach of promise of marriage continues to exist, and as long as an inadequate *locus penitentiae* is allowed to parties who are always too ready and willing to marry in haste. But perhaps there is no harm in practising a little "preventative law."

SOME RELIGIOUS FACTORS IN FAMILY AND WELFARE LAW

B. Hargrove

The average lawyer takes professional cognisance of religion, when it occurs in the life of the community in the same way as the reasonable man regards bacteria in edible food, in other words, that it is present in a negligible quantity and requires positive action only on those occasions when the internal procedures of the system are upset by it. An example of this attitude is implicit in the basis of approach set forth in the report of the Royal Commission on Marriage and Divorce [1]:

> "This Report will contain no discussion of what may be called the religious aspects of marriage and divorce, but it must not be thought that these aspects have been overlooked. We have had evidence from Christian Churches and other religious bodies and have done our best to weigh that evidence, together with all the other evidence laid before us. We have, however, conceived it to be our duty to examine the problem before us from the point of view of the State, which has to legislate for all its citizens whatever their religious beliefs may be."

To trace the *non sequitur* of that passage is but an elementary exercise but its meaning is clear: the evidence was adduced, considered and laid aside and it indicates the general approach which has, over the years, produced surprising results, *inter alia*, in the field of divorce law.

The expression "religious factors" is an uncommon one, for the theoretical devaluation of religion has led many writers to seek the broader scope of "morals" as the subject of inquiry rather than religion,[2] a regard for what a man *accepts* rather than what he *believes*. In this one can see, to some extent, the acknowledgment

1 Royal Commission on Marriage and Divorce (Cmd. 9678—1955), para. 38.
2 *Cf.* Devlin, *The Enforcement of Morals* (1959).

of the sociological viewpoint rather than that of the philosopher or logician.

Why a Current Legal Problem?

In the light of what has already been said, what justification is there for dealing with religious factors at all in a series devoted to current legal problems? To answer that question it is necessary to consider the gradual alteration which has taken place in the effect which the law has had with regard to religious factors. Before the Statute of Appeals, 1532–3, the law regarded the observation of religious tenets as a duty, and one which would be enforced by penal sanctions by the Ecclesiastical courts. Admittedly, the power of those courts continued after the Statute, but it slowly waned until by the early part of the nineteenth century it became possible to speak of a state of religious toleration,[3] which meant that, while religious duties would not be exacted by the courts, a person was entitled to believe and preach what he liked within the laws of defamation, blasphemy and sedition. This, however, did not conclude the development.

The concentration of powers and wealth into the hands of the central and local authorities, by means of taxation, nationalisation and welfare legislation brought with it a new threat to religious toleration. It became pointless to say that a person might believe what he wished if, during his early formative years, his education was to be State, or State-Church, designed. Equally, if any religious denomination was to exist as an effective force, particularly if charity was one of its major objectives, its bankruptcy was assured unless it received some relaxation of the more stringent provisions of taxation and corporation law on the one hand, and some assistance from the State in the form of direct or indirect subsidies on the other. Finally, the power of religious bodies over those who looked towards them for charitable assistance began to disappear with the assumption by the State of the task of providing for the sick, senile and otherwise under-privileged members of the community.

To deal with this situation there has developed a network of statute and case law giving religious bodies grants from central

[3] *Cf. Taylor's Case*, 1 Vent. 293; *R.* v. *Williams*, 26 St.Tr. 653.

funds, as in the case of education, and giving to the individual the right to ensure that the religious training of his children is in accordance with his wishes, that right being either enforced or considered by the courts.[4] At the same time the assistance of the religious bodies was sought and obtained in relation to certain types of welfare work, as, for example, in cases of adoption. If we were to summarise the development in terms of Hohfeld's analysis of rights and duties there appears a gradual change from a religious "duty," to a "liberty not" to be persecuted for one's beliefs, to a limited "right" to select the religious practices which an individual and his children will observe. While this evolution has taken place, another trend has emerged (whether by reason of the theory of toleration or otherwise) in the exclusion of religious considerations from certain branches of the law, notably those appertaining to marriage, divorce and nullity. It is this double-edged development which creates a current legal problem.

While religious toleration was the accepted attitude of the State, this passive situation caused few direct conflicts between the law and religious practices. However, the protection of the concept of tolerance produces, as becomes apparent from the succession cases dealt with below,[5] difficulties for those who wish to safeguard their succession against the attractions of alternative creeds. More important still has been the erection of a code of morality which at times is quite distinct from accepted religious evaluations. The early Victorian would have regarded the compulsory purchase of land, without adequate compensation, as being not only bad property law but as immoral legislation. He would probably have used a stronger term of the recent innovation whereby a husband who, out of charity, accepts his wife's illegitimate child as one of the family may be rewarded for his kindness by being forced thereafter to maintain that child.[6]

The terminology used by the "State morality" is a further cause of difficulty. Where expressions such as "welfare of the child" or

[4] The difficulty of establishing a right to selected religious education is illustrated by *Watt* v. *Kesteven County Council* [1955] 1 All E.R. 473.

[5] See below under the sub-heading of Public Benefit and Policy in Religious Charitable Trusts and Wills.

[6] Matrimonial Proceedings (Children) Act, 1958, s. 1 (2).

"public benefit" are used, it is no great problem to trace out the policy consideration for which such expressions are often a cloak. But when identical terms are used by both the exponents of State morality and by the Christian religious bodies, the frictions and misunderstandings multiply. For example, in *Hyde* v. *Hyde and Woodmansee*,[7] the House of Lords used the expression:

"Marriage as understood in Christendom."

Later decisions have been at pains to point out that this means a monogamous marriage only and not necessarily a Christian one.[8] With such difficulties and problems occurring in the field of terminology, it is not surprising that the conflicts between the accepted standards of various Christian and other religions, on the one side, and the norms of conduct accepted by the courts, on the other, should occur with increasing frequency. But it is surprising that with a few noteworthy exceptions [9] there has been no detailed study of this conflict and unfortunately this paper can do no more than touch upon a few of the salient points.

Factors Defined

It is now possible to define the various religious factors which the law has affected.

1. Religious toleration, with the side effects of preventing religious distinction.
2. Provisions for religious welfare, both public and private.
3. Conflicts between religious and legal concepts of domestic institutions.
4. The recognition of religious behaviour patterns as affecting the legal interpretation of the conduct of the parties to a domestic dispute.
5. The emergence of limited legal rights in matters appertaining to religion.

[7] (1866) L.R. 1 P. & D. 130, 133.

[8] The editors of *Rayden on Divorce* (1960, 8th ed.) refer with some accuracy to "the so-called Christian marriage" (p. 72). *Cf. Penhas* v. *Tan Soo Eng* [1955] A.C. 304.

[9] See F. H. Newark, "Public Benefit and Religious Trusts," 62 L.Q.R. (1946), p. 234; Z. Cowan, "Religious Restraints in Wills," 17 L.J. (1944), p. 374; Sir Roland K. Wilson, *The Province of the State* (1911).

These factors cannot be mutually exclusive and frequently one or more will be operating in any given problem. The consideration of the second factor requires an extended view of "welfare law," for it includes problems in the field of both charities and testamentary dispositions.

There is one aspect of the religio-legal position which is mentioned here merely to indicate that it has not been overlooked, although in a paper of this length it would be impossible to deal with it adequately. The potential position of religion and the law is not reflected on a practical plane by a survey either of the present case or statute law. The religious bodies still exercise considerable influence over legislation both by means of orientating public opinion and by direct action. Over the last three decades, whenever a Royal Commission or Committee has been appointed to hear evidence, the religious bodies have always been present in force to put forward their views,[10] and, at closer quarters to the legislative act, a reading of any debate on education will reveal that the religious influence cuts across the party division to a very great extent. It is not, however, with these subtler influences which this paper is concerned. It has no pretension to be a theoretical jurisprudential study but is merely an effort to evaluate in outline, by reference to a number of strictly practical branches of the law, how far the factors already mentioned exist, the relationship of the law to them and which reforms are needed to produce a more effective system.

Divorce, Nullity and Marriage

The peculiarly insular rule of divorce jurisdiction, that the procedure of the English courts may not be used to dissolve a polygamous marriage,[11] has as its basis the Christian concept of marriage. It has been suggested that this rule is part of the wider

[10] See, in particular, Royal Commission on Marriage and Divorce 1951–55 (Cmd. 9678—1955), Royal Commission on Children and Young Persons 1960 (Cmnd. 1191—1960).

[11] The extension of this rule to maintenance proceedings in the magistrates' court produces both injustice and hardship, which the courts, while regretting, seem powerless to avoid. See *Sowa* v. *Sowa* [1960] 3 All E.R. 196 (Div.Ct.); [1960] 3 W.L.R. 733; and *The Times*, February 11, 1961, where the Court of Appeal upheld the ruling on the issue of jurisdiction.

rule that the courts will not accept as valid provisions of a litigant's personal law in a domestic dispute which are repugnant to English public policy. In fact, the two are quite distinct. There is nothing in public policy which prevents a polygamous marriage from being recognised; it is simply that the process provided for the dissolution of a marriage is suitable for a Christian marriage only. It seems strange that by doing this the courts at times seem to be anxious to ignore the religious bonds (polygamous though they may be in nature) which the litigants have elected to assume. An illustration which verges on absurdity from the practical viewpoint occurred in *Ohuchuku* v. *Ohuchuku*,[12] when the parties to divorce proceedings were domiciled in Nigeria, where they went through a ceremony of marriage in 1949. Such a ceremony, though potentially polygamous, was valid under local customary law, both parties being Christian and not intending to take another partner. Shortly after arrival in England, owing to difficulties concerning a marriage certificate, the parties went through a ceremony at a register office in 1953. Wrangham J. felt constrained to point out that he was granting a divorce of the 1953 marriage only and not of that in 1949. This would probably leave the parties married under the law of their domicile and can hardly be regarded as a satisfactory state of affairs. The narrow interpretation of jurisdiction as being based on the Christian monogamous marriage and ignoring the other religious ceremonies which the parties have considered binding seems to be an unfortunate example of inflexibility and intolerance towards the non-Christian religions, which is less understandable today with the more fluid state of society, than when the rule first became concretised in *Hyde* v. *Hyde*.[13] As will be seen later, the courts, while rejecting the polygamous union, have not adhered to the real meaning of the term, a Christian marriage, thus making the distinction still less understandable.

On the other hand, the presumption in favour of a marriage has induced the courts to ignore disabilities placed upon a party by his personal religious law and to hold that where such a person has

[12] [1960] 1 All E.R. 253; [1960] 1 W.L.R. 183.
[13] See above, note 7.

gone through a ceremony of marriage he cannot plead that incapacity. Thus, a member of the Greek Church, who by his religion cannot contract a marriage save in accordance with the rules of that church, has been held to have capacity to contract a marriage in England,[14] and similarly the disabilities as to capacity to marry imposed by a Hindu caste have been held not to invalidate a monogamous marriage.[15] Since in these cases the religious disability forms part of the person's domiciliary law, *a fortiori* where a disability as to capacity is imposed by a religion which is not part of the law of the domicile the courts will not allow it to invalidate a marriage. Accordingly, the marriage of Roman Catholics to non-Catholics at places of non-Catholic worship and the marriage of monks, nuns and priests of the Church of Rome while they are in England will not be invalidated by reason of religious disabilities.[16] Few would object to these decisions which seek to ensure that hidden disabilities do not nullify apparently lawful marriages.

The Christianity of English Marriage

One might be led to believe, from an historical standpoint, that marriage is regarded by the law in the light of Christian principles, *e.g.*, as to its formation, duties and termination (in so far as Christianity can be said to countenance divorce at all). How far is this true today? Sir Patrick Devlin seems to have no doubt as to the theory[17]:

> "Take for example the institution of marriage. Whether a man should be allowed to take more than one wife is something about which every society has to make up its mind one way or the other. In England we believe in the Christian idea of marriage and therefore adopt monogamy as a moral principle. Consequently, the Christian institution of marriage has become the basis of family life and so part of the structure of our society. It is not there because it is Christian. It has got there because it is Christian, but it remains there because it is

[14] *Papadopoulos* v. *Papadopoulos* [1930] P. 55.
[15] *Chetti* v. *Chetti* [1909] P. 61.
[16] Clergy Marriage Act, 1548, and Clergy Marriage Act, 1551.
[17] *The Enforcement of Morals* (1959), p. 11.

> built into the house in which we live and could not be removed without bringing it down. The great majority of those who live in this country accept it because it is the Christian idea of marriage and for them the only true one."

In theory Sir Patrick may well be right, but as regards the practical approach of the courts, the foundations of the house, if not already undermined, are certainly slipping. One of the most widely accepted aims of marriage (in both Christian and non-Christian beliefs) is that of the procreation of children and one might go even further and say that the aim is not fulfilled merely by the provision of a stable social unit in which a child might be brought up.[18] In *Baxter* v. *Baxter*[19] the issue was whether the persistent use of contraceptive methods rendered the marriage voidable for non-consummation. Jowitt L.C.[20] sought to distinguish the position of the procreation of children as follows:

> "In any view of Christian marriage the essence of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith. But that is not the same thing as saying, that a marriage is not consummated unless children are procreated or that procreation is the principal end of marriage."

The problem this passage sets is that, in so far as it denies that the main objective of marriage is the procreation of children, it seems to ignore the generally accepted Christian belief on this point and even on logical grounds the distinction between "the essence of the matter" and "the principal end" may appear to be too fine a distinction for an essentially practical institution. The decision in *Baxter* v. *Baxter* may well be justifiable on social policy grounds in that the contrary would have undermined the accepted relationship in a number of cases but it should be recognised that it is a deviation from the accepted religious principles of marriage. A clearer

[18] If this were so there could be no objection to stable unions outside wedlock.
[19] [1948] A.C. 274.
[20] *Ibid.* p. 286.

light, and one which, it is submitted, reflects the true views of the courts, appears in the judgment of Jowitt L.C. in *Weatherley* v. *Weatherley* [21]:

> "The law of the land cannot be coextensive with the law of morals, nor can the civil consequences of marriage be identical with its religious consequences. The solution to the question which arises for determination in a divorce case cannot be settled on a consideration of the Christian doctrine of marriage as laid down in the *Book of Common Prayer*, but on a true construction of the relevant Acts of Parliament."

This, it is feared, terminates the legal recognition of religion as a basis for marriage. The civil marriage as it appears from legislation is to be separated from the roots which gave it life, and the religious beliefs of the parties [22] mentioned by Sir Patrick Devlin will carry no more weight than behaviour patterns at best, or unrecognised custom at worst. No one asks that the morals or religious observation should be coextensive with the law, but unless there is some common basis between the two, uncertainty will arise with different codes competing for observation, one based on the civil courts' attitude, the other upon those of the religious denominations. These conflicts have already begun to find their way before the courts and in some instances the court is recognising not the validity of the religious belief, but the reasonableness of the behaviour pattern of the parties concerned.

In *Jodla* v. *Jodla* [23] the parties were both members of the Roman Catholic Church and had married at a register office. By the tenets of their faith such a marriage was void. The husband did not consummate the marriage but the wife asked him to arrange for a religious ceremony and this he refused to do. Hewson J. held that the husband had wilfully refused to consummate the marriage, that the wife's request for a religious ceremony was tantamount to a

[21] [1947] A.C. 628, 633.

[22] While it can be argued that marriage is a status and it is not open to the parties to alter the terms on which that status is recognised, nevertheless, the "implied terms" in a marriage as now incorporated, for instance, in Matrimonial Causes Act, 1950, s. 8, show that there can be cases where the State recognises certain implications of conduct existing between parties as affecting the validity of the marriage.

[23] [1960] 1 All E.R. 625.

request, conditional upon such ceremony taking place, for full marital relations. Accordingly, even if the husband had requested sexual intercourse, his failure to arrange the religious ceremony would have given the wife just cause for refusing. The wife was therefore granted a decree of nullity on the grounds of wilful refusal and the husband's petition was dismissed. Upon the facts, this decision probably takes the best path through a difficult situation. Probably, if the parties had not both been members of the same faith, and there had been no prior understanding concerning a religious ceremony, the case might have been decided in a different manner. But where a prior agreement exists, based on the known religious beliefs of one of the parties, the court would be in the dilemma, either of ignoring a bona fide agreement, or of binding a person to the behaviour of a religious code which he did not accept. The *Jodla* case will probably be criticised because it recognises that the parties may, by their beliefs and implied agreements, deprive one of the parties, for a time at least, of one of the main rights in marriage, and one of the principal remedies in nullity. The argument that the parties are being permitted to alter their marriage status and obligations is invalid here, since it has always been recognised, particularly in the case where a husband takes a wife of more mature years *tam quam soror*,[24] that the right to intercourse is not absolute and may be excluded altogether by agreement. It must be admitted, however, that this case is not easily reconcilable with *Coppinger* v. *Coppinger*,[25] where it was held that a person who did not institute divorce proceedings because of religious scruples had been guilty of unreasonable delay. It may be that as between the parties to a marriage a religious belief is relevant, while as between the individual and the State it is irrelevant, since the latter relationship will be more rigidly guarded by the courts. This is admitted to be a faint attempt to explain the apparently inexplicable and the answer to the problem, it is submitted, is that the whole law of delay, in so far as it does not amount to approbation, insincerity or grounds for estoppel, is outmoded and should be removed from the Statute Book.

[24] *Brown* v. *Brown* (1828) 1 Hag.Ecc. 523.
[25] (1918) 34 T.L.R. 328; *ibid.* 588 (C.A.).

Effect of Religious Beliefs and Procedures on Divorce

While the courts refuse to relinquish jurisdiction by recognising the validity of religious procedures for nullifying or dissolving a marriage, the courts have been forced to take account of those procedures as setting up behaviour patterns. The best example of this occurs with the Jewish bill of divorcement, which seems to be basically consensual in character. While not going as far as in *Jodla* v. *Jodla* [26] and reading an additional term into the marriage contract, the court has had to consider whether a Jewish divorce (which may be based upon grounds not recognised by English law) may amount to consent to separation and thereby terminate desertion,[27] or whether it amounts to connivance at the subsequent adultery of the other partner.[28] On the question of desertion the principle involved is by no means clear. In *Joseph* v. *Joseph* [29] the Court of Appeal held that the obtaining of a Jewish bill of divorcement terminated the husband's desertion. In *Corbett* v. *Corbett*,[30] where it was held that the desertion did not come to an end, Barnard J. held, distinguishing the *Joseph* case, that the consent required for the bill was not enough to terminate the desertion, since throughout the wife had been endeavouring to placate the husband and to induce him to return to her.[31] Barnard J. insisted on considering the effect of the "Get" in the light of all the surrounding circumstances. Again, with the actual decisions on these two cases there can be little cause of complaint but the principles on which they have been decided are anything but clear. In *Joseph* v. *Joseph* Jenkins L.J. stated [32]:

> "Counsel for the wife invited us to ignore the 'Get' given to the wife as a mere nullity having no effect in English law, either as a decree of divorce or as an agreement to separate. I agree with him that the Get has neither operation."

[26] See above, note 23.
[27] *Joseph* v. *Joseph* [1953] 2 All E.R. 710; *Corbett* v. *Corbett* [1957] 1 W.L.R. 486, 492.
[28] *Preger* v. *Preger* (1926) 42 T.L.R. 281.
[29] [1953] 2 All E.R. 710.
[30] [1957] 1 W.L.R. 486.
[31] An interesting example of the court regarding the subjective motive of the Act rather than the objective intent.
[32] [1953] 2 All E.R. 710, 712.

With this statement Barnard J. agreed in *Corbett*,[33] but Jenkins L.J. continued [34]:

> "I cannot accept the position that where a Get, which purports to effect a divorce according to Jewish law, has been given by a husband to a wife with the approval of the Beth Din, both spouses being of the Jewish faith, it would be consistent with the religious obligations of those two persons to ignore the Get and live together again as man and wife." [35]

The courts, therefore, have rejected the theory that a consensual religious divorce is equivalent to an agreement to separate and in *Joseph* it seems that the Court of Appeal held that the Get not only terminated the desertion by the wife's consent but also amounted to good cause on the part of the husband for remaining apart. *Corbett* v. *Corbett* dealt with the question of the wife's consent, holding that such consent was rebutted by the surrounding circumstances, but failed to deal adequately with the question of good cause for remaining apart, a matter which will depend, not merely upon the attitude of the deserted party, but also of the state of belief of the other party.[36] It may be that a change of religious beliefs on the part of the party living in potential desertion under such a bill of divorcement may ripen into full desertion if he changes his religion.[37] This type of confusion is the direct result of the court failing to define in clear terms the exact legal significance of a religious ceremony.

In the case of connivance the courts have adopted a similar attitude to the desertion cases, refusing to be bound by the actual form of the bill of divorcement and insisting on regarding it as only one of the factors which influence the decision whether connivance has occurred or not. In *Preger* v. *Preger* [38] and more

[33] [1957] 1 W.L.R. 486, 492.
[34] [1953] 2 All E.R. 710, 712.
[35] Would the position have been materially different if one of the parties, not being Jewish, had expressly or impliedly agreed to be bound by the Jewish law prior to marriage?
[36] See *Glenister* v. *Glenister* [1945] P. 30; [1945] 1 All E.R. 513.
[37] It is submitted that the courts would be slow to accept such a view, although there seems no logical reason in law why the proposition is incorrect. *Cf. Forbes* v. *Forbes* [1954] 1 W.L.R. 1526.
[38] (1926) 42 T.L.R. 281.

recently in *Leeser* (*orse. May*) v. *Leeser* (*orse. Bohrer*)[39] the court decided that consent to a Jewish bill of divorcement did not amount to connivance. It is unfortunate that these decisions were not stronger in their terms, since a person who finds herself religiously bound to a course of action (*e.g.*, consenting to a Get on the ground of sterility) may be at the same time depriving herself of the civil rights to divorce by connivance. It is to be hoped that when a decision of the House of Lords is forthcoming it will effectively remove the danger and permit persons to follow the religious dictates of their conscience without jeopardising their civil rights.[40]

In cases which do not fall within the categories set forth above the divorce courts adopt a severely objective test in assessing conduct which flows from a religious belief. Thus, in *Patching* v. *Patching*[41] a husband, being a member of the Jehovah's Witness sect, who neglected his wife in order to follow his religion and desired her to be governed by the rule of his sect, was held to have driven the wife out and to be in constructive desertion. Similarly, in *Fletcher* v. *Fletcher*,[42] where a husband resided in a religious community, wanted his wife to join him and also refused sexual intercourse, the husband was held to be in desertion. On the other hand, the fact that a person changes his religion does not give the other party to the marriage just cause for leaving.[43] While every sympathy may be felt with the objective test in so far as it relieves one party of an unbearable union, it is quite inappropriate that a person who acts under a religious belief should be described as a "guilty party."

Children and Religious Factors

The position concerning the religious instruction, education and upbringing of children is, to say the least, strange. Elaborate provisions are set forth in conscience clauses in the Education Acts to provide parents with an option concerning the religious education

[39] *The Times*, February 5, 1955.
[40] This becomes a more pressing issue upon the question of delay.
[41] *The Times*, April 25, 1958 (Div.Ct.).
[42] [1945] 1 All E.R. 582.
[43] *Russell* v. *Russell* (1935) 80 S.J. 16.

of the child, yet those provisions are not normally enforceable by action in the courts.[44] Where a child is taken from the parents, for example, where the child is sent to an approved school, precautions are taken, and parents vested with rights of objection[45] so that the religion of a child shall not be impaired. The same policy can be detected in the rules relating to detention centres[46] and the provisions dealing with the boarding-out of children with foster parents, where a report on the religion of the foster parents is required,[47] and also in cases concerning adoption.[48] Most of these cases give rights of objection to interested parties, but the main problems are left untouched by the welfare clauses.

Where the religious beliefs of a person come into conflict with the State concerning the welfare of a child, the tendency has been to override such parental views. In *R.* v. *Senior*[49] the court accepted the test of requiring the taking of steps which a reasonable parent could be expected to take in deciding whether there had been an offence under the equivalent enactment to section 1 of the Children and Young Persons Act, 1933.[50] The parent's belief, that medical aid was an unnecessary evil, causing the omission to get assistance did not absolve him from blame. The increase in cases where parents withhold consent where an operation upon a child is needed causes some concern. In *Oakleigh* v. *Jackson*[51] it was held that an unreasonable withholding of consent to such an operation constitutes an offence. The prosecution of a parent for manslaughter will do little to assist the child under such circumstances, and a recent attempt has been made to remedy this situation by utilising section 62 of the Children and Young Persons Act, 1933, whereby a juvenile court can order that a child should be committed to the care of a fit person (in this case the hospital) as a child in need of care and protection.[52] This required the setting

[44] *Watt* v. *Kesteven County Council* [1955] 1 All E.R. 473.
[45] Children and Young Persons Act, 1933, s. 68 (3). For the right of a school to reject a person not of a suitable creed, see s. 81.
[46] The Detention Centre Rules, 1952 (S.I. 1952, No. 1432), rr. 48–52.
[47] The Boarding-Out of Children Regulations, 1955 (S.I. 1955, No. 1377), r. 19.
[48] Adoption Act, 1958, s. 4 (2).
[49] [1899] 1 Q.B. 283.
[50] 23 & 24 Geo. 5, c. 12.
[51] [1914] 1 K.B. 216.
[52] s. 62 (1) (*b*).

up of a juvenile court with the utmost expedition if the child was to benefit by it and steps were being taken to secure this end when ministerial intervention obstructed this very desirable innovation.[53] This has emphasised the need for some speedy procedure to override unreasonable parental refusal in such cases. But, it is submitted, any new provisions in the law would have to require consideration of the reasonableness of the decision, taking into account the religious beliefs, not ignoring them.

Parental Disputes over Religion

The disappearance of the common law rule that a father had the right to choose the child's religion[54] has been replaced by the generalisation that the welfare of the child should be paramount.[55] Under this cloak certain general principles seem to have emerged. The court will not uproot a child who has already firmly convinced views on religion[56] and where a change of religion would cause a division between the child and her family[57] or guardian.[58] It is not intended to discuss the detailed cases which have occurred on this topic. Suffice it to say that in practice it is found that the issue of custody seems to override the problem of the religious education of the child. A consideration of the welfare of the child normally means the *physical* welfare in relation to living conditions, and the *spiritual* welfare is considered at a later stage. This is particularly to be regretted for so often it means that material benefit is accepted as the main criterion of welfare and the spiritual welfare of the child becomes subsidiary. It might well be thought that the religious spiritual welfare of a child is more important than the physical element. Moreover, the courts preserve the position of flux by invalidating agreements made between the parties concerning the religious education of the child,[59] save where the agreement indicates that the party concerned has abandoned his rights *in toto*.

[53] It is to be questioned whether in the Sheffield incident the intervention of the executive to prevent access to the judiciary is defensible on any ground.
[54] See *Re Collins, An Infant* [1950] Ch. 498; *cf. Re Frost* [1947] Ir.R. 3.
[55] Guardianship of Infants Act, 1925, s. 1.
[56] *Stourton* v. *Stourton* (1857) 8 De G.M. & G. 760.
[57] *Re Clarke* (1882) 21 Ch.D. 817.
[58] *Condon* v. *Vollum* (1887) 57 L.T. 154.
[59] *Andrew* v. *Salt* (1873) 8 Ch.App. 622.

It is unfortunate that making such agreements void should increase uncertainty, encourage disputes and appear to be a direct act aimed at the Roman Catholic Church, without, so far as one can see, securing any compensating benefit for the child.

As the law now stands there is no obligation upon a parent to provide his child with religious instruction. It is submitted that this should be remedied by a statutory provision whereby a person who fails to provide Christian religious instruction (or non-Christian religious instruction where both parents belong to a particular non-Christian faith) to children up to school-leaving age would be deemed to have neglected the children, and in fact the children would be deemed to be in need of care and protection.

Public Benefit and Policy in Religious Charitable Trusts and Wills

The problems facing the testator and settlor who wishes to ensure that a religious objective is achieved are twofold. First, he must negotiate in the case of trusts the perilous waters of public benefit. In the case of testamentary dispositions he must ensure that the conditions he requires are neither void for uncertainty nor such that the court may deem them to be contrary to public policy.

In the sphere of public benefit it has been laid down and zealously supported for many years that the fact that a trust is for religious purposes is not enough; there must also be the element of public benefit. As recently as the cases of *Davis* v. *Perpetual Trustee Co.*[60] and *Re Warre's Will Trust*[61] this doctrine has continued to frustrate the intentions of those who settle property upon trust which cannot be said to be directly beneficial to the public. One can sympathise with such difficulties. There is no clear statement of what public benefit means. The view that it means relieving the rate-payers of a burden disappeared, it is submitted, with *Re Manser*[62] in 1905. The courts refuse to accept the efficacy of the purely spiritual life and prevent settlement in favour of contemplative orders, so that in *Cocks* v. *Manners*[63] a gift to two

[60] [1959] A.C. 439.
[61] [1953] 1 W.L.R. 725.
[62] [1905] Ir.R. 68.
[63] (1871) L.R. 12 Eq. 574.

Roman Catholic orders was held to be partly charitable and partly not by reason of the fact that one of the orders was a contemplative group. The absurdity of the English case was illustrated by Gavan Duffy J. in *Maguire* v. *Att.-Gen.*[64] in 1943 where it was pointed out that the object of religion is the worship of God, not the by-product of relief of rates, additional education or the like. It seems strange that even the by-products of the contemplative life, the assistance gained by the public from the example of a devout way of life and the facilities for spiritual advancement to a group, should be ignored in favour of the more materialistic doctrines. One can leave this topic with three examples. In *Re Arber*[65] the court held that a bequest to secure the ringing of bells to thank God on the birthday of the settlor was not charitable, there being no element of public benefit. Yet in *Re Pardoe*[66] the ringing of bells on the occasion of the restoration of Charles II was a good charitable trust. Precisely what benefit the public gains either from the bells, Charles II or the combination of the two is beyond comprehension. In conclusion, one cannot find a better argument against the present system than the words of Black J. in *Munster and Leinster Bank* v. *Att.-Gen.*[67]:

> "Example is sometimes better than precept and the pattern of a self-sacrificing life may impress more than an indifferent sermon."[68]

In testamentary dispositions the courts have been most wary of permitting a person to tie a legatee to a particular religion. In *Re Wolffe*[69] the marriage of a woman of Jewish faith to a Christian resulted in her forfeiting £600 a year. This has been criticised by Lord Denning in his recent Romanes Lecture.[70] It seems that while one should hold one's religion strongly, attempts to persuade others to do the same by economic sanction are to be deprecated by the courts, for *Re Wolffe* is the exception to the general rule.

64 [1943] Ir.R. 234.
65 *The Times*, December 13, 1919.
66 [1906] 2 Ch. 184.
67 [1940] Ir.R. 19, 30.
68 The writer gratefully acknowledges his indebtedness to F. H. Newark's article, "Public Benefit and Religious Trusts," 62 L.Q.R. (1946), p. 234.
69 *Re Wolffe, Shapley & Wolffe* [1953] 1 W.L.R. 1211; [1953] 2 All E.R. 697.
70 *From Precedent to Precedent* (1959), p. 15.

One must face the fact that by the present policy the courts are preferring no religion to a religion by economic persuasion and denying to the testator the right which they grant and zealously preserve in the case of a trade union, that of peacefully persuading others by economic sanction.

Conclusions

We can therefore derive the following conclusions from the present state of the law in relation to religious factors:

1. Where a person's religious beliefs can be established as a fact, the law seeks to safeguard the practice of those beliefs subject to 2 below.

2. Where the practice of these beliefs does not benefit the community either in whole or in part, the law will not grant special protection to the religion as such.

3. Where a person practises a religion which harms or may harm another, the courts will restrain that person either actively where the activity falls within one of the accepted categories of tort or crime or by invalidating dispositions made by such a person which might be thought harmful to another person.

4. (a) The claim that the law will not adjudicate between religions is hardly accurate in modern times, the yardstick of adjudication being material benefit.

(b) Where there is a conflict between the material welfare of a person and his religious welfare, it seems that the material welfare weighs more heavily in the consideration of the courts.

5. The refusal of the courts to recognise the behaviour patterns which flow from the religious factors result in uncertainty and status stigma in divorce, in the frustration of the reasonable intention of the parties in agreements relating to children, and in the invalidation of testamentary dispositions and gifts to religious orders which fail to qualify as charitable gifts.

6. The attitude of the law towards religious observation is that it is part of a person's individual liberty. The law fails to recognise such observation as conferring, of itself, a beneficial

service upon the community generally and refuses to accord special benefit to those who accept and observe religious tenets.

7. In so far as the law refuses to recognise religion as anything above a personal attitude meriting no special encouragement, it probably reflects majority opinion; whether such a course is inducive of respect of the law, or is aimed at the encouragement of a healthy society is open to doubt.

8. The restrictions on religious freedom have, during the last fifty years, emanated mainly from the courts' interpretations and not from legislation.

MORE THINKING ON LAW AND MORALS

S. J. Stoljar

The separation of law and morals has long fed keen debate among both philosophers and lawyers. The main controversy, broadly speaking, has traditionally opposed the legal positivists to the natural or moralist lawyers, the former maintaining where the latter have denied a necessity to distinguish sharply between law as it is and law as it ought to be. In this paper, however, I shall not review the old debate, but rather shall try to settle it: to suggest, at least, the outlines of a solution, though one (let me add this quickly) which will be of a logical, not of an ideological, kind. For my business now is not with the virtues of a lawful-cum-moral life; it is with the purely intellectual arguments which still becloud—and often falsely becalm—the disputed issues. More particularly, I shall try to show that law and morals, if indeed quite separate, also have a special relationship and, further, that even a rigorous positivism is perfectly compatible with the view that at any rate certain legal rules have a *necessary* moral content. Showing this will lead to a concomitant discovery. For we shall come to dissect two meanings of law, very different from each other, yet also so close and complementary that only their combination adequately reveals what it is we mean by " legal " rules or a " legal " system.[1]

Positivism Reaffirmed

By way of starting, and just to reaffirm the essentials of positivism, consider for a moment the example of the laws of slavery. Surely

[1] Though I shall pursue my own and (I hope) independent line of thinking, I have been greatly stimulated by two recent and important contributions: Professor Hart's " Positivism and the Separation of Law and Morals," 71 Harv. L.R. (1958), p. 593, and Professor Fuller's " Positivism and Fidelity to Law," 71 Harv.L.R. (1958), p. 630. These papers add a new freshness to the old controversy, yet they also introduce new and somewhat confusing variants: for if Hart is a positivist, he is not an Austinian, and though Fuller argues for a " legal morality," he also repudiates natural law which he regards as purely a positive phenomenon. At any rate, their respective arguments seem to me to

this is at least one clear instance of laws which have existed, which in one way or another may still exist, and of which we would all agree that they morally are not what they ought to be. Thus, it simply becomes a fact of life that harsh laws can clash with more generous moral sentiments: a clash which, however infrequent or isolated, is nevertheless sufficient proof that law is separate from morals, inasmuch as law is not automatically controlled by a superior morality. Such, indeed, is the substance of the positivist case; in fact, the expression "positive law" (especially as it began to be regularly used by eighteenth-century Continental lawyers) typically refers to laws, whether good or bad, yet laws as they actually exist, not as we wish they existed. The slavery-example also furnishes a brief and simple refutation of the classic theory of natural law and its practical pretensions. For though the natural lawyer may well protest that slavery offends our sense of human equality or justice, these protestations do not of themselves alter the inferior legal status of the slave, that is, the status which for the time being is actually operative in a legal system. In short, the conclusive answer to natural law (I mean traditional natural law, for I shall later try to isolate a different variety) is this: that had it ever been immediately effective, there could never have been a law of slavery since natural law would always have intervened to check it; and once we admit the legal facts of slavery, there really is no argument if (as is usual) we already agree with the moral condemnation implied in the appeal to natural-legal standards.

But positivism has received another challenge from a more recent school: the legal moralists. Inspired by a dictum of Lord Mansfield's to the effect that the law "works itself pure by rules drawn from the fountain of justice," [2] legal morality has been presented as a sort of dynamic force which, if occasionally slow, is in the end triumphant. Accordingly, the material question is not whether evil laws have existed (for the legal moralists seem to accept the facts of history), but whether, and how, even evil laws yield to moral pressure. In other words, the law can be seen as a continuous

remain rather inconclusive; more generally, I may perhaps say that while I agree with Hart's broad thesis, I am unhappy about the way he supports it, and while I like many of Fuller's specific points, I disagree with his general conclusions.

[2] *Omychund* v. *Barker* (1744) 1 Atk. 21, 33.

process of reform, so that to the extent to which this reform takes place the law becomes inseparable from ethical standards since it is these standards which guide the reforming process. On this view, therefore, the law "is" not simply what nominally it is, if it is constantly liable to be changed into what it ought to be.[3] On this view, moreover, even the Roman law of slavery can acquire a different perspective: it can now be regarded as a progressive movement, for if slavery long survived as a legal institution, its primitive rigours greatly softened with the growth of more charitable values.[4]

Certainly all this tells us something interesting about the development of law, even about the history of our civilisation; but all this is not really relevant to our present problem. For one thing, to work itself pure, the law needs time, a process which reflects the law in motion, whereas our present problem lies in the clash between law and morals at any given moment. For another, all the anti-positivist theories (that of traditional natural law as well as that of legal morality) lead to a logical impasse. For these theories manage to obscure the difference between existing or enacted law on the one hand, and future or possible law on the other, thus insinuating the idea that existing and future laws somehow operate concurrently. Yet if this were so, not only could we never name an existing law, but we would vacate the concept of law as it is, because the law would continuously be subject to some additional moral standard or to some future development, always (so to speak) around the corner. One will observe that my whole argument, as indeed the whole positivist case, rests on a notion of the law as it is, of law existing here and now. Yet what do we mean by saying that the law "exists" or is "operative" or "enforced" and so on?

[3] Perhaps the chief exponent of this view is Professor Fuller. He does not, it is true, give it quite such explicit statement, but such must be his reasoning, if he is to be saved from inconsistency. For though he strenuously resists the partition between law as it is and as it ought to be, he yet speaks of law in two distinct senses, *i.e.*, law on the books (including law with which he disagrees) and, secondly, law as morally important ideals: *op. cit.*, pp. 637, 661. Again, though he apparently agrees with Hart that there can exist evil laws, Fuller answers that is not "likely" or will not "generally" happen: *op. cit.*, pp. 636–638. Yet admitting this much, Fuller no longer opposes the positivist position, but in fact only announces a rival, but still not contradictory, theory of a morally developing legal system.

[4] See, *e.g.*, W. E. H. Lecky, *History of European Morals* (New York, 1955), pp. 101–102.

Or, to put the question differently, in what sense do we say that a legal rule "exists," for does not a moral rule "exist" also? To consolidate my argument, I must therefore clarify such statements as "the law as it is" or "the law exists," and especially clarify some of the institutional assumptions behind them.

The Command Theory of Law

Unfortunately, this clarification has become a far more cumbersome task because of a prevalent fashion which dismisses the theory, familiarly associated with Austin, according to which (putting this very briefly) law is essentially a command from the sovereign. This command-theory, it is often said, is too simple and crude, for law is "surely not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion." [5] Now it is very true that the command-theory does not explain all legal phenomena; still, the theory has a sort of logical priority in that it gives to law its first and basic marks of identity. At any rate, it is not (I think) enough to describe law as (for example) the "fundamental accepted rules specifying the essential law-making procedures." [6] Such a description is not enough, because it says nothing specific about *legal* rules, but rather states a general truth about all rules. For unlike facts, rules are not "given," so that we need rule-making procedures for legal, just as for any other, activity governed by rules; and rules, furthermore, which would need to be "fundamental" or "accepted" at least in this sense: that they must specify an activity that is in fact pursued or is at least pursuable.

However, returning to Austin, even admitting that his theory allows of several important objections (which are to be examined later), it is vital to stress that these objections do not demolish what

[5] Hart, *op. cit.*, pp. 601–603. One is easily misled into thinking that Professor Hart rejects altogether the notion of law as a command. But he also speaks of the "coercive framework of the law" and further admits that criminal laws are like commands; and there are even passages suggesting a necessary connection between laws and sanctions: *op. cit.*, pp. 621–623. Hart, therefore, only denies that *all* laws are commands; though, of course, this does not explain the *legal* quality of the laws that are or are not commands, nor how laws which are not commands are related to laws which are.

[6] Hart, *op. cit.*, p. 603.

is perhaps Austin's major discovery. Confronted by so many things called "law" (divine law, moral law and natural law quite apart from municipal and common law), Austin was one of the first (and very few) legal thinkers who perceived the problem arising in this analogical use of the word "law." He saw that since such analogical usage has no self-evident or self-determining boundaries, conceptual clarity demanded thorough attention to the important differences hidden in the relevant analogies. Austin, in other words, was not just stipulating a new definition of law, nor did his reference to "law properly so called" express a personal taste: what he meant was that logical absurdity would result if law were not properly so called.

Consider this problem in another way: how can we build any solid distinction between legal and other rules? It is clear that we cannot simply say that different rules refer to different physical activities, for this would not furnish an adequate criterion: we would not give a good or complete reason why (say) the rules of tennis should not be regarded as legal or why (say) stealing should not be regarded as the rule of a game. The point about a rule is that it not merely specifies an activity, it also is a prescriptive statement: it tells us *to do*. But a rule may prescribe this in various ways, so that to distinguish between different rules means to ask what type of prescription a rule contains or, rather, to ask about (what may be called) the "prescriptive force or authority" that a rule bears. And applying this question, several distinctions soon appear. As regards the rules of a game, their force or authority can be seen to depend on the degree of consent and co-operation displayed by all the partners in a game. In the case of legal rules, on the other hand, their prescriptive force or authority, far from being similarly consensual or self-imposed, points to the special relationship between the rule-maker and the persons for whom the rules are meant. Clearly, the rules for playing tennis are not like the rules for paying tax: tennis-players co-operate, while taxpayers chiefly submit.

We can now see where the command-theory fits in. For the theory points to the specific dimension of legal rules, namely, their immediate involvement with a political structure in which (to state

the barest minimum) a sovereign commands and his subjects obey. Again, the command-theory immediately helps us to distinguish more clearly between legal and moral rules. While moral rules also tell or prescribe to us what to do, the distinctive feature of their prescriptive force lies in the quality of the act prescribed, its moral quality which may be intuitive or utilitarian, "eternal" or merely persuasive (something philosophers have long argued about). But, whatever it is, the prescriptive force of a moral rule does not arise from the consent or the voluntary participation that players show in a game, nor does it arise from the authority of the political rule-maker or commander himself. In other words, whereas moral rules specify certain standards or criteria for assessing or judging acts, legal rules are primarily referable to the institutional facts of political life, to the facts of government with its distinctive hierarchic relationship between the rulers and the ruled. Admittedly, the command-theory is still very broad, though we may well wonder whether variable political behaviour can at all be tellingly summarised except in a broad way. At any rate, it is well to remember that Austin was quite aware of the shortcomings of his theory; but he would not abandon it, for he had (as Professor Fuller has rightly said) a "sure insight" that this would destroy his whole distinction between law and morality.[7]

Objections Reconsidered

Nevertheless, before we can use the Austinian or, at least, a semi-Austinian theory, we must face the objections to it. First, the theory is said to be wrong in its insistence upon the habitual obedience on the part of those commanded, as this notion suggests an entirely false picture of mass obedience offered to a sovereign both outside and above the law. Next, the command-theory is criticised for its failure to account for the many legal rights furnished by every legal system without so much as hinting at intervention by the sovereign or the police. So it is one thing to say, "Do not steal," yet quite another to say that "an offeree may accept the offer of a contract made to him by the offeror." Indeed,

[7] Fuller, *op. cit.*, p. 640.

as regards such legal rights, it would be nonsensical to command A to have a right against B or to apply sanctions compelling A to exercise such a right. Thus, the command-theory, though it seems to cover the criminal law, does not seem to cover the mass of other legal rules or rights—the law of contract, the law of testamentary dispositions and other things.

It should at once be admitted that Austin much over-extended his command-theory. More precisely (and dealing now mainly with the first criticism), his mistake was to try to locate a sovereign who occupied the highest and most powerful peak. This model of an absolutely omnipotent sovereign came from the analogy with the laws of God, which Austin considered to be true laws, or laws properly so called, God being the uncommanded commander *par excellence*.[8] Only little reflection shows that the laws of God are not at all comparable to the laws set by men to men. God's sovereign status remains unaffected, whether he is or is not obeyed. A human or political sovereign, on the other hand, directly depends on habitual obedience, for in this case " sovereign " would become a vacuous concept if deprived of its obedient complement. We have, however, to be careful about this notion of obedience. For present purposes it matters nothing what form the obedience takes, whether it is enthusiastic or acquiescent or customary; what matters is that the obedience be " habitual," a social reality which, however primitive, is nevertheless sufficiently regular and predictable to demarcate it from chaos or anarchy, a state in which the utter irregularity and unpredictability of life would make the issuance of laws a completely pointless exercise. More boldly, either there is no obedience and therefore no law, or there exist conditions of life which pre-suppose, at any rate, *some* habitual obedience to *some* laws or commands. So seen, the sovereign is no longer an uncommanded commander hovering above and outside the law, but rather becomes a way of expressing what must be our central social hypothesis, namely, that chaos has given way to, at least, some system of regulation that is obeyed by a significant group, bringing into existence a political society which means a society having laws.

[8] See particularly Austin, *The Province of Jurisprudence Determined, etc.* (Hart ed., 1954), Lect. III.

More broadly still, we can say that words such as "sovereign," "subjects," "obedience" and "laws" are the necessary concepts that express the basic facts of political organisation and the conditions of order and normality upon which such organisation rests.

Another difficulty is often urged. As the sovereign must be determinate, yet is merely human and mortal, he has occasionally to be elected, appointed or replaced; but these jobs, needless to say, call for special rules, if the replacements are to occur with any regularity and without anarchic breaks. Do these rules still qualify as laws? As for the time being there is no sovereign, there is none to command and none to be obeyed; how, then, can the rules for appointing or electing a sovereign be laws in any Austinian sense? This difficulty is much less formidable than at first appears. In truth, the difficulty seems yet another outcome of the misleading analogy with the laws of God; for while God is in eternal command, no human sovereign could ever aspire to similar permanence. Moreover, to ask whether election laws still are "laws" is somewhat like posing the conundrum: "Who rules a country when the ruler is asleep"? To answer "Nobody" would give an absurd picture of political society returning to a state of nature every time the ruler goes to bed. Since in human society such interruptions are regular events, our model of sovereignty must include these natural limitations if it is to be relevant to the situation of laws set by men to men. In similar vein, it is often said that the command-theory cannot account for the rules that provide for constitutional checks and balances. This cannot detain us long; and it must here be sufficient to say that these checks and balances still presume a sovereign, since otherwise there would be nothing to be checked and that even a checked sovereign, though never as powerful as an absolute prince, still retains a *relatively* supreme power in a given society, if only because there is no higher political power than the sovereign, however limited or checked.

Thus, and whatever we say, we cannot do away with the notion of sovereignty. Without it we could not even begin to explain such simple things as why (for example) Frenchmen obey French and Englishmen obey English laws, or why Frenchmen do not

(in France) obey English laws, or why in England the laws enacted by Parliament are superior to the rules of (say) the M.C.C. In this light, the command-theory merely becomes another name for what we otherwise call an "independent political society" or the "coercive framework" of the State. The framework represents the public order, that is, the criminal or other laws which are fundamental in a most literal sense. For it is just this political command structure that distinguishes a state of utter lawlessness from a state where law and order are possible at all.

If such is our command structure, how do legal rights fit into it? As already pointed out, the legal rules relating to contracts or dispositions of property are not commands, but are rights and privileges entirely within a person's own autonomy of choice. Is it then true (as many have claimed) that private legal rights are basically incompatible with a command-theory of law? Austin, it will be remembered, repeatedly called these rights "circuitous," "remote" or "indirect" commands.[9] And even if this is rudimentary and vague, Austin was again not so very far from the truth. For, clearly, even private rights are directly dependent upon the basic coercive framework of society, since, only after personal and proprietary security have been assured, can there be room for private transactions: private exchanges could scarcely take place, would in fact be unthinkable, if murder, robbery and theft were rampant and uncontrolled. Hence legal rights are not so much indirect commands as they are legal rules which assume, or rest upon, a structure or framework of certain primary laws or commands. Between legal commands and legal rights there is, however, a further difference. The various commands against theft and similar acts also mean that commercial or property transactions have to be voluntary; for, unless voluntary, criminal or delictual sanctions would ensue. But these voluntary transactions can be of unlimited variety (which no law-giver or codifier ever has had, or perhaps ever will have, the imagination to foresee), so that the settlement of disputes has not only to be left to judges, but often also requires judges to make new decisions, including new legal rights and rules,

[9] Austin, *op. cit.*, pp. 29 *et seq.*, 136–137.

after the event. This, to be sure, does not render private legal rights independent of commands. On the contrary, the intervention of courts presumes a jurisdiction in place of private self-help or revenge, a compulsory jurisdiction backed by the political sovereign. Obviously, without this special power or position judges would at best be umpires or arbitrators rather than officials making enforceable law.

Judge-Made Law: Its Freedom and Inherent Restraints

Nevertheless, to say that judges can and do make law is to say something both very trivial and very complex. The complex question is whether, in making legal rules, judges act freely or whether their activity is conditioned by any restraints. However, to answer this we must digress briefly to distinguish between the various jobs that a judge may perform. To simplify matters, suppose first (to pursue an example suggested by Professor Hart) that a statute makes regulations concerning "vehicles": does the word "vehicle" apply to aeroplanes, motor-boats as well as toys? The statute, of course, may enumerate all the instances to which "vehicle" applies, in which case the judge has only to *apply* the law, *i.e.*, enforce the law as it is. But, in the second place, suppose that a vehicle is not expressly listed in the statutory class. A purely "deductive" or "lexigraphical" technique will not now tell us how far the word can be stretched, so that we now enter an area where the applicable rule is uncertain or unclear, an area well described as the "penumbra" of a law,[10] though a penumbra which may be of two kinds. First, a statute, while purporting to give a complete list of "vehicles," may not use the operative term uniformly throughout the Act. Here the judge will have to "work

[10] Hart, *op. cit.*, p. 607 *et seq.* Professor Fuller, *op. cit.*, p. 661, seems to deny the existence of penumbral situations, as in his view the judicial application of statutory words is always the same. There seems to be some misunderstanding here. Surely it is not denied that some rules are sufficiently clear to be applied without interpretation, while other rules need to be interpreted before they can be applied. Nor can it be denied that a legal rule must contain some, however few, definite instances as the barest minimum. Surely millions of taxpayers or traffic offenders would gladly testify to the fact that some legal rules are, unfortunately, only too clear, and moreover are applied with a harsh and all too predictable routine, quite irrespective of any moral consideration of what in their case (they think) the law ought to be.

out" what applies to what, since he is not free to legislate a new meaning for "vehicles." Secondly (and this is the more usual case), the statute, though neither exhaustive nor clear in terms, may indicate its overall purpose or policy. A judge will now be able to include or exclude the vehicle in question according to the purpose or (in the older phrase) the "mischief" of the Act. So if the statutory purpose is to tax vehicles, private planes seem as taxable as private motor-cars; if the purpose is to regulate land traffic, the statutory rules seem inapplicable to aircraft or motor-boats.

It is important to see that even in this latter case the judge performs a task of interpretation rather than one of legislation. The statute, it is true, is incomplete, as many situations are not specifically provided for. However, the express statutory policy does indicate the mischief to be cured, thus restricting the judge from deciding contrary to it. In short, though the statute does not tell us what the law "is," since all applicable instances are not yet named, the statutory policy tells us what the law "ought" to be. This "ought," it will be noticed, does not refer to a judge's own moral choice; this "ought" has rather a functional legal significance: it says what the law will be, provided the statutory policy is faithfully applied. And this shows that where a judge is (in this sense) interpreting a statute, he still acts very much under the broad direction of the sovereign.

We now come to another and far more interesting case. Suppose that there is neither statute nor any case-law to give the least control or guidance to a judge, that is, he is confronted by an entirely new situation, perhaps one never thought of before. Or, likewise, suppose that a judge wishes to overrule an old decision or merely to qualify it. Now in all these situations the judge will have to legislate new legal rules. Moreover, to perform this legislative task, a judge will need greater freedom than when merely applying or interpreting a statute or when merely following an existing rule. But how "free" or "arbitrary," how "independent," can a judge be? The full significance of this question becomes clearer as soon as we compare the legislation by a judge with that of a sovereign legislature. As everybody knows, such a legislature (*e.g.*, the British Parliament) can make any rule, even to the extent of depriving an

innocent citizen of all or any of his legal rights. Though unthinkable in a liberal society, the point is that such oppressive laws are not "illegal," for it is part of saying that a legislature is sovereign or supreme that makes its legislative power as arbitrary or free as the legislators want it to be.

By contrast, consider the position of a judge. Suppose that, in making his rule, he announces his intention to impose liability for no better reason than that he personally dislikes the litigant. We would immediately protest that a judge cannot do this. But then why not? Suppose the judge argues that he is free to decide as he thinks fit, precisely because there are no explicit restrictions impinging on him. What do we say then? How do we explain that a judicial decision, arbitrarily arrived at, can be "invalid" or "incorrect" or "wrong"? Would we not now discover (with some surprise) that we have no ready argument against an arbitrary judge?

Observe that it does not help to say that a higher court will overrule his decision, for this only states a rule about appellate machinery, not a standard or criterion for regarding the decision itself as invalid or wrong; moreover, the appellate court might itself be as arbitrary as the lower judge. Nor does it help to say that the "rightness" or "wrongness" of a decision depends on nothing more complicated than on whether it is followed or not, for this again does not tell us what is now at issue, namely, how far a particular judge can go. Nor, again, does it help to appeal to such notions as "natural law" or (what Professor Fuller calls) "legal morality" or "fidelity to law," since these notions do not (as we have seen) communicate an effective sense of "law": they either refer to a future law or assert values or ideals which may or may not be shared.

It follows that our task is precisely this: to find a way in which we can validly say that a judge acts not only undesirably, but acts "illegally," when he makes arbitrary rules, though "illegally" not in the sense that the judge incurs a penalty for being arbitrary or that his decision is void automatically, but in the sense that his decision is "wrong" because "inconsistent" with another rule recognisably inherent in the legal system, whether that rule is

actually provided for or not. Or to put this in another way: though we must impose certain restraints upon the judge's freedom to legislate, these restraints need to have an immediate or positive legal effect, yet a legal effect which does not contradict the positive argument maintained so far. Indeed, this is the very point on which at least one major conflict between positivism and natural law really turns.[11]

The Inherent Restraints and Their Moral Force

What I shall hereafter try to show is that every legal system must, as a system, evolve certain rules or restraints to which a judge has to conform. As we shall see, these rules are negative in character: they indicate the sort of decision that a judge cannot make rather than indicate the creative choice or policy a decision should contain. What, then, are these restraints, and how do they arise? The first broad answer is that they arise because of the institutional arrangements which are necessary to translate the commands of the sovereign into legal rights and decisions affecting people before a court. For the sovereign's commands are normally general and impersonal, inasmuch as they refer to a class of persons, not to a specific individual. These commands are general simply because a society of any size cannot manage without general laws, since it is a *number* of people who usually need to be told what they can or cannot do. Not only does this class-generality of the commands require that their application be delegated to special officers whom, of course, we call judges, but the latter's function (and this is now the important point) will be to apply the general and impersonal commands in an impersonal way. The reason is this: that being in a subordinate or delegated capacity, a judge cannot be allowed to introduce " subjective " or " personal " considerations in applying a

[11] This conflict is not always faced. For example, in the Hart-Fuller debate, both participants eventually so qualify their respective positions that their disagreement becomes considerably less specific than their arguments lead one to expect. Thus Hart, though a positivist, finally admits that judicial legislation is not purely arbitrary without however saying what the non-arbitrary limits are: *op. cit.*, pp. 628–629. Similarly, Fuller seems to recognise that laws remain laws, because not automatically avoided by higher or better laws: *op. cit.*, p. 660 *et passim*; but does this not imply that there can be " arbitrary " laws which his legal morality will not reach?

law, since otherwise the judge would be able to modify the general and impersonal nature of the superior commands and thus would be able to decide a case on frankly arbitrary grounds. This, clearly, would make it useless to entrust to judges the application of general laws, for instead of applying these laws they would in effect be able to make or unmake laws exactly as they please. Moreover, in so doing, judges would no longer exercise a delegated function under the sovereign, but would rather assume that sovereign power themselves. In short, the restraint against arbitrary or purely personal decisions arises because of a judge's subordinate or sub-sovereign position and the limitations which derive therefrom.

More important now, however, is a second type of restraint which obtains where a judge operates within his own area, *i.e.*, where he makes his own law and which (it will be remembered) is also the area which started our whole difficulty. Here we cannot say that a judge becomes arbitrary merely because of the " personal " or " subjective " way in which he handles legislation from above, for the judge is now his own legislator: this is the very task assigned to him. What sort of rules can he legislate? Sometimes, of course, he is told to exercise his own discretion, when he will decide each as an individual case. Yet apart from this, a judge has usually (and this is the vital feature) to make *general* rules, and this because his decisions are meant to apply, at least notionally, to more persons than one particular pair of litigants. Indeed, unless a judge did make such general rules, he would no longer legislate, but would just dictate his personal views from case to case. In fact, the only guarantee we can devise for confining judges to a subordinate or non-arbitrary status, yet still giving them enough room to legislate, is just this: to require that their rules be, or try to be, general in range. For observe what is involved in this requirement to make *general* legal rules. For one thing (and most obviously), generality requires that the rule must apply to a class of persons which means that the rule is, as it were, depersonalised, so that the persons within the general class will have to be treated in an impersonal way. For another thing, generality means that a judge must act consistently with existing rules in order to ensure that persons receive as far as possible equal treatment on the

same or similar facts. This requirement is more familiarly known as the doctrine of precedent which, whatever its technicalities and whatever else it may or may not do, still pursues the same aim broadly describable as certainty or consistency in the law.

Another restraint, also implicit in the requirement of generality, has to do with the formulation of a rule. For example, where a judge decides a case with regard to a person's liability for an injury, it will never do to rest his decision on such grounds as that the injury happened at a particular time or particular place. For what purpose would be served in imposing liability on the ground that the injury took place on a certain day, say at 5 p.m. sharp? Not only would this specification exclude liability for similar injury at any other time; even, more importantly, a ground of this kind would introduce qualifications so limiting as to render the decision purely *ad hoc*, that is, the qualifications of time and place would seriously impair the required generality of a rule. It follows that in making legal decisions and rules a judge will have to advance impersonal or impartial or consistent or (in a word) general reasons or grounds. And we can now see that the requirement to make general rules, which at first looks simple and unremarkable enough, amounts to a most powerful limitation upon the judge. The various restraints also have a deeper effect, for they tend to stress and strengthen the " objective " or " rational " qualities which will have to be present where a judge makes or applies rules. In a sense these are all " logical " qualities, for the qualities represent criteria of validity, not matter of policy; and, again, criteria which follow logically, *i.e.*, are *necessary* requirements, once we unpack the assumptions behind the judge's position in the institutional scheme of things. Indeed, it is precisely because of this demonstrable connection between the judge's sub-sovereign position and the restraints incidental to it, that these restraints also qualify as legal rules. Furthermore, the various restraints we have mentioned furnish a complete programme of " legal morality." For, provided the various anti-arbitrary restraints are observed, there is no other limitation we would wish to impose on judge-made law, and this because a judge would always have to retain sufficient freedom to change old or to make new rules.

It will be objected that all this paints too romantic, at least too one-sided, a picture of judicial activity. How, it may well be asked, does this account tally with some admitted discrepancies between law and morality, discrepancies of which the most well-known example is probably this. A man sees a child drowning in shallow water, yet though aware of the danger and though perfectly able to help, he does nothing to save the child from certain death. As English law stands, this man incurs no legal liability at all, notwithstanding the fact that the man's refusal to help would generally be regarded as a supremely immoral act. Is not this, it will then be said, conclusive proof that our moral judgments can differ sharply from some positive legal rules? Still, the nature of this clash must be further explained. It is not as though the common law were proclaiming its independence of common morality. The variance is rather an illustration of something else, namely, how the restraints against judicial arbitrariness and especially the consistency-requirement to which judges must conform can lead to a sort of legislative helplessness on the part of courts. The reason is that to make our man liable would require a new rule, yet one which, however desirable morally, has no technical connection with any existing principles in the law. For since (speaking roughly) our man never *promised* to do anything, nor had done or omitted anything to *bring about* the injury to the child, there are in our existing law no relevant legal categories or analogies that could be pressed into service against him.

Thus it becomes clear that the requirement of consistency, though in itself a "moral" restraint, produces a paradoxically immoral result; yet it is a paradox only likely to arise in a marginal case, one so peculiar and infrequent that it has never, not even remotely, been legally provided for. No similar helplessness hampers legislation by a sovereign. For (conventional or constitutional prohibitions apart) a sovereign can originate laws irrespective of existing rules and even in crass opposition to established usage and attitudes. Moreover, this contrast between the legislative freedom pertaining to the sovereign and the more restricted freedom given to courts sheds further light upon the basic relationship between law and morality. On the one hand, legislation by a

sovereign can be moral or immoral as the case may be, for the laws or commands from the sovereign do not depend on moral standards, but depend on the facts of political power in the State, in practice the extent to which these commands are actually obeyed. On the other hand, the laws which judges make are not similarly "political" except in the special case (that, however, does not concern us here) where, as in the United States Constitution, the judges possess certain functions of legislative supervision or control.

This apart, however, how moral or immoral can judicial law-making be? The answer can now be stated quite schematically. First, where judges are confined to applying laws handed down by the sovereign, they have to respect the "generality" of these laws, which requires that they will have to avoid purely "personal" or "subjective" considerations in applying them: something that also explains how it comes about that judges can sometimes apply "unjust" laws in a scrupulously "just" way. Secondly, where judges perform a more original function, *i.e.*, where they can and do legislate, their activity assumes a much more distinctive moral character. Because judges must, in legislating, make general rules, and so have to make "consistent" and "impersonal" and "objective" rules, quite apart from being impartial and neutral in applying them, judicial legislation will to this extent produce moral rather than immoral rules. Again, because of their politically subordinate status as well as their need to be consistent, judges will usually remain within the moral assumptions of currently existing law, so that even where they do make new rules or overrule old ones, their legislative departures will not clash with the moral values which are either generally accepted or are at least acceptable to those who, holding political power, set the dominant moral tone. And this is perhaps just another way of saying that it is, in large part, the legal system itself which makes judges into moral conservatives.

The Restraint-Rules and Natural Law

Our discussion of judicial restraints leaves one more question to be asked. Granting their legal effect, what is their more formal

status as legal rules? More particularly, how do the rules of restraint compare with other legal rules such as our judge-made law of torts or contract? This comparison, with the differences it reveals, is most important. The ordinary common law rule, *e.g.*, that a contract requires consideration, has a directly normative import in that it tells the parties what they must do or how they must make their promises, if there is to be an enforceable contract. The rules of restraint, on the other hand, do not specify physical acts of this kind: they are rules primarily applying to judge-made law itself. Again, an ordinary legal rule is a changeable norm, simply because the courts can (outside the doctrine of precedent) change or qualify existing rules. The restraint-rules, by contrast, are permanent, since they are inherent in a legal system, *i.e.*, one where law is administered or made by judges. At first sight, it is tempting to regard the restraint-rules as procedural; but this classification would clearly be wrong, simply because procedural rules merely regulate the administrative steps in the administration of law, which regulations are, of course, changeable.

But further: once we see our rules of restraint for what they are, as being not only legally effective but also permanent rules, may we not properly regard them as a sort of "natural law"? Indeed, the expression "natural law" here acquires a twofold significance. In the first place, the law is natural in an institutional sense which describes the natural or inevitable consequences of a system wherein judges occupy a subordinate or sub-sovereign position, a position that requires them to apply statutes impartially as well as to announce general rules if and when they do legislate. In the second place, the phrase "natural law" now also conveys a more traditional idea, namely, that judicial law-making is controlled by certain moral criteria which also happen to be both fundamental and unchangeable.

Nevertheless, this kind of natural law must never be confused with its traditional variety. The traditional theory (as we have seen) tried to convey that there are superior moral standards that must govern even the sovereign's laws, though of course that theory never really explained how this superior morality issues into effective rules rather than remains a mere declaration of moral values or views.

In the kind of natural law which I have attempted to isolate, certain moral criteria do take effect legally: not, however, just because they are moral, but take effect *derivatively*, as a natural or logical requirement in our legal system and of the judicial administration of law. It is most important to stress this derivative effectiveness of certain (and then only special) moral rules. For it is often still thought that some broader moral postulates belong, originally and basically, to a legal order as such. Take, to give just one example, the so-called principle against retroactive legislation with which even some positivists have found difficulty. This principle, briefly, is to the effect that no legal liability, sanction or punishment is to be incurred unless for a breach of law that is legislated in advance. Now (in passing) this principle cannot apply unqualifiedly to judge-made law, if only because the judge's task often is to settle disputes, and to make legal rules, after the event; indeed, much of the common law represents the cumulative results of what is in effect retrospective legislation, without this having ever been regarded as a kind of odious or immoral law. Nevertheless, retroactive legislation does become a highly immoral procedure, especially when seen in its more extreme form. Clearly, a horrible situation would arise if one law could first permit or encourage the doing of an act, while another law would then inflict punishment for doing what was previously allowed. Not only would the legislator thus use law as an instrument almost of deception or fraud, but legislation so used would soon undermine the very possibility of order as based on habitual obedience, an order requiring at least some pattern of predictable and dependable rules.

Still, the real point now is that so long as in fact the legal system did not break down, so long as people somehow continued to obey, some sort of political order would be preserved, so that the retroactive laws would still be laws, however morally odious or objectionable they might be. And the same is true of all other moral postulates or so-called natural rights which are often said to pertain to any political or legal order itself. For all these postulates (whether they ask for equality, or for mercy, or for tolerance), what they really ask for is that our social arrangements be guided by some such ideal as social harmony or as government by consent.

The distressing truth, however, remains that history is full of cruel and tyrannical societies, all with their unfortunate yet enforced laws; and the mere recognition of this makes it impossible to maintain that there is an original or necessary connection between law and morality.

Summary

This brings me to my final and summarising remarks. It is clear that a political sovereign can make and enforce any laws, be they moral or immoral laws, provided and so long as the command structure exists, that is, so long as legal rules are habitually obeyed. But the fact that a legal system exists does not imply that the laws *must* be obeyed: this "must" is a logical, in a sense a sociological, one, rather than a moral or deontological "must." Otherwise said, the fact that we habitually obey does not itself impose a duty that we must obey. For obedience is a matter of human choice, so that we can always give or refuse obedience according to what we wish the law ought to be, including the price we are prepared to pay for that choice. In this sense, men have the law or government they deserve; and such is, in fact, the simple if perhaps disenchanting lesson that positivism has to teach.

At the same time, this picture of "law" or "legal system" is by no means complete. For in point of historical fact, popular obedience is not often refused: anarchy is rare, and legal systems exist for considerable periods and with a considerable degree of permanence. In practice, what therefore interests us is not so much whether, or on what conditions, a legal system exists, but how the system actually runs, and especially how judges operate as they settle disputes and administer the law. But judges (as we have seen) cannot make legal rules with the same freedom as the sovereign, for their sub-sovereign position requires them to observe various restraints, restraints which give to judge-made law a distinctive non-arbitrary or moral character. Moreover, as this judge-made law reflects the daily and the lawyerly working of the legal system, we are often persuaded to think that law is typically a "rational" or "logical" or "moral" activity. Nor is this an unreal view, provided we do not forget this: that there can be no judicial activity

unless a political society exists, that, further, the sovereign may be guilty of immoral laws, and that judges may have to apply the immoral laws sent down to them.

In sum, to understand the true relationship between law and morals is to understand two things. First, law can express the facts of the political set-up, in which case laws and morals are separate simply because sovereign power can be exercised immorally, always so long as the sovereign is obeyed. Secondly, that laws consisting of judge-made rules exhibit certain necessary and inseparable moral qualities which derive from certain logical criteria of validity which again derive from the institutional requirement that judges have to make general rules. To understand this may be much or may be little, according to one's jurisprudential tastes. But, at the very least, such understanding may help to free us, and I think luminously, from some rather old yet always recurring difficulties in what it is we mean by "law as it is" and "law as it ought to be."

LEGAL ASPECTS OF FLAT SCHEMES

E. H. Scamell

In view of the large number of multi-storey blocks of flats which are constantly making their appearance in all the big cities and also in a number of the smaller towns in this country it is hardly necessary to say that the popularity of the flat as a unit of dwelling accommodation is rapidly increasing. This is by no means a new phenomenon, since people have been living in flats in this and other countries for well over a hundred years, and in one or two instances in this country the idea of the flat or, to take its old name, a set of chambers, goes back several centuries.[1] So far as this country is concerned, however, the pre-war flat-dweller was for the most part a tenant at an economic rent and not the owner of his flat. Since the War, there has been a reluctance on the part of developers to erect blocks of flats with a view to letting them off at economic rents since quite a good deal of legislation has been passed during the last twenty to thirty years which has been of such a kind as to give little encouragement to this form of investment. On the contrary, the tendency has been for the owners of existing blocks of flats, which have hitherto been let out to tenants, to dispose of those blocks by selling the flats separately to purchasers as and when the flats become vacant. In more recent years and in particular since the provision in the Housing Repairs and Rents Act of 1954,[2] which excluded from the operation of the Rent Acts all new buildings which were completed after the Act came into operation, this tendency to build blocks of flats for sale in individual units rather than for investment has to some extent been reversed, but nevertheless the idea of being able to purchase a flat out-and-out has proved rather an attractive one to many would-be flat dwellers and the practice of flats being built and sold in individual units is, I think, not likely to come to an end in the foreseeable future.

1 Some chambers in Lincoln's Inn, London, have been held in fee simple since the late seventeenth century.

2 s. 35.

Jurisprudential Basis of Flat Ownership

At first impression, it may seem somewhat incongruous to talk of ownership of a flat since ownership is usually associated with the exclusive right to the occupation of a piece of land—using the word "land" here in its commonly accepted sense as part of the earth's crust. Indeed, in many countries the idea of the ownership of part of a building which is separated from the soil itself by another part of the same building is (or has been, apart from legislation) quite unacceptable. Thus, it appears that according to Roman law it would be impossible to own an upper flat in a multi-storey building separately from the remainder of the building.[3] Not unnaturally, therefore, since the legal systems of most Continental countries are based upon Roman law, the same rule is found in a number of Continental legal systems. Nevertheless, it is true to say that the flat is even more popular and even more in evidence in certain Continental countries at the present time than it is in this country. In such countries, the Roman law prohibition has been overcome by legislation which has provided codes for regulating the position of the various flat owners between themselves, and for making appropriate provision for the regulation of the block as a whole. Mr. J. Leyser has recently made an interesting comparative study of the ownership of flats.[4] He shows that in France, Belgium, Italy, Holland, Germany and Austria special legislation has been introduced—in each case within the last thirty years—specifically to deal with the question of ownership of flats. In Belgium it is significant that in recent years some 90 per cent. of the total residential development which has been completed has consisted of blocks of flats which have been disposed of in individual units to the flat dwellers.

Undoubtedly, legislation is the most effective way of providing for all the foreseeable problems which may arise. It may be regarded as typical of England and of English legal institutions, however, that they have, without the aid of legislation, risen to the

[3] See Buckland and McNair, *Roman Law and Common Law* (2nd ed., 1952, revised by F. H. Lawson), p. 102.

[4] "The Ownership of Flats—a Comparative Study," 7 *The International and Comparative Law Quarterly* (1958), pp. 31–53.

occasion presented by the demand for flat ownership and have so far proved sufficiently adaptable to cope with most of the problems which arise. At present and save only in regard to one particular matter concerning the incidence of Schedule A tax,[5] there is on the Statute Book no special provision dealing specifically with flat ownership or the problems to which it gives rise, and up to the present time it has been found possible to meet the needs of both developers and purchasers of flats—and of equal importance to both —purchasers' mortgagees, by means of existing principles of property law.

The Variety of Schemes

The different types of flat scheme which have been put into operation since the War are as varied as the different types of building to which the schemes have been applied. In its simplest form, a scheme may consist of nothing more complicated than the sale by the owner of a two-storey house of the upper part, he retaining the lower part. At the other end of the scale, an elaborate scheme may be required to deal with a new block or several new blocks of flats in which such services as passenger lifts, constant hot water and central heating are to be provided, and ornamental gardens are to be maintained.

Not unnaturally, it is the vendor or owner of the entire building who has called the tune and laid down the terms upon which he is prepared to sell his flats, and draftsmen of flat schemes have necessarily had the owners' interests uppermost in their minds. It does not follow, however, that the owners' best interests are not served by offering the fullest possible advantages and protection to the purchasers and I think it is fair to say that most schemes worthy of the name have clearly sought to safeguard the interests of the purchasers.

Nevertheless, in his desire to purchase a flat a would-be flat dweller may well frequently embark upon flat ownership without reflecting sufficiently on the special hazards or seriously questioning whether the rights which he appears in so many words to be getting are really worth anything more than the paper they are written on.

[5] Finance Act, 1957, s. 18.

I therefore propose, in this paper, to give some indication of some of the special points which a purchaser should have in mind in deciding whether to proceed with a proposed purchase, to consider the raw materials of the law on which he must rely for his protection and then to indicate any loose ends which may in due course of time have to receive attention from the legislature.

Freehold or Leasehold?

In many of the early schemes, the tendency was for flats to be sold freehold rather than by way of long lease. For reasons which are not easy to understand, however, a number of building societies and insurance companies declined to advance money on the security of a freehold flat, although they might be quite prepared to do so in the case of a flat held upon a long lease. The basis of this attitude seems to have been that covenants in leases are much easier to enforce than covenants entered into between freeholders; but, although this is undoubtedly the case as between the original covenanting parties and their respective successors, it is by no means so when considering the enforceability of covenants between different flat owners. Nevertheless, there has in recent years been a distinct preponderance of leasehold flat schemes, although it would appear that in substance the only difference between a freehold and a leasehold flat is the almost invariable existence of a rent reserved out of the latter. In the views which are expressed below, no distinction is made as between the two forms of ownership, since the problem and difficulties appear to be substantially the same in each case.

The Flying Freehold

The situation which arises where an upper part of a building is owned separately from the lower part has been described as giving rise to a "flying freehold." [6] So far as English law is concerned, there is not, in principle, any special difficulty arising in this connection, because English law has for long been familiar with the

[6] See S. M. Tolson, "'Land' Without Earth: Freehold Flats in English Law," 14 (N.S.) *The Conveyancer and Property Lawyer* (1950), pp. 350–357.

separate ownership of mines and minerals, on the one hand, and the surface of land, on the other. Further, there is essentially little difference between the separate ownership of terrace houses which involves a contiguous building being sliced up vertically and the separate ownership of flats or floors or part of a floor of a building which involves a slicing up of the building in horizontal layers. The only material difference is that the owner of the terrace house also owns the soil on which his part of the building rests. In this connection, it must, of course, be borne in mind that according to English law there is, for most purposes, no difference between land in the sense of the surface of the earth's crust and buildings or structures which are erected on the land—they are both "land" in the legal sense. Jurisprudentially, therefore, the problem of flat ownership presents no difficulty in English law. The situation is indeed now statutorily—and seemingly somewhat prophetically—catered for by the provisions of section 205 (1) (ix) of the Law of Property Act, 1925, which defines "land" as including "buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way)."

Nevertheless, the horizontal division of a building to which flat ownership gives rise does present some peculiar problems. Thus, it is highly material to the owner of a flat at the top of a building to know what the owners of the lower flats are going to do—or not do—with their main walls. Clearly, if the owners of the lower flats simply stand by and allow the walls to decay, the owner of the upper flat may, in due course, well find himself in difficulties. This may be regarded as the basis of the problem. But there are also various refinements which have to be considered, since it is also material, though not vital, for the owner of one flat to know how the owners of the other flats are going to deal with their flats from the point of view of user and maintenance generally. These matters will clearly affect the amenity of the other flats.

The Special Problems of Flat Ownership

In essence, what any one individual flat owner will be concerned about will be the following matters.

(1) *Ownership of the flat*

First, he will be concerned to see that he does get the full legal ownership of his own particular flat. With one exception, namely, the co-operative flat scheme, all flat schemes secure to the flat owners the legal ownership of their flats. The co-operative flat scheme is essentially an importation from the United States, which provides for the vesting of the legal estate of the entire block in trustees to be held by them upon trust to permit each of the members of the scheme to occupy one flat.[7] This type of scheme, whilst it exists, has not so far made any general appeal in this country and I do not propose to consider it further here. In all other types of scheme, the legal ownership in the individual flats is vested in the respective flat owners. No difficulty arises about this; it is purely a question of drafting so as to delineate precisely the physical limits of the flat.

It is a not uncommon practice at the present time to describe the flat rather generally by some such description as "all that flat or suite of rooms known as Flat No. 1" (or as the case may be) "on the first floor of the building known as 'The Mansion,' High Street"—and so on. This may well be sufficient to identify the rooms concerned but it does leave open certain questions concerning the exact limits of the property which is owned. For example, there will usually be certain walls which will be common to that flat and one or more adjoining flats; there will usually be one or more outside walls, and, in the case of a flat on an intermediate floor, there will be a ceiling which will form the floor of an upper flat and a floor which will form the ceiling of a lower flat.

In regard to walls, the position seems to be fairly clear. First, where a wall is a party wall with another flat, the provisions of section 38 of the Law of Property Act, 1925, will apply and the ownership will be deemed to lie along a middle line severing the wall vertically with cross easements of support in favour of each of the adjoining flat owners. Secondly, in regard to outside walls the presumption, in the absence of any express provision to the contrary, is that the full thickness of the outside wall is included in the flat.

[7] See E. F. George, *The Sale of Flats* (2nd ed., 1959), Chap. 9.

This is so even in the case of a fairly short lease of property and was forcibly illustrated in the case of *Re Webb's Lease*.[8] This case concerned a demise to a tenant of an upper flat over a shop which had an outside wall to which was affixed an advertisement hoarding for which the advertiser paid a rent of £50 a year. Nothing was said about this advertisement in the lease and the tenant claimed that the whole of the wall was his, that the advertisement was therefore fixed on his wall and he was accordingly entitled to the rent. The Court of Appeal upheld this claim and decided this significant point on the limits of a lessee's interest in his flat. *A fortiori* the decision in this case will apply to the case of a flat the freehold of which is conveyed.

In regard to the ceilings and floors of a flat, there is not such clear authority. It is highly doubtful whether the provisions of section 38 of the Law of Property Act, 1925, would apply, since it would not seem that the floor of a flat which also forms the ceiling of a lower flat is a "party structure" within the meaning of the section. The attitude of surveyors seems to be that the presumption would be that the whole of the floor—whatever it might consist of: joists and floor boards or reinforced concrete—will belong to the owner of the flat in question save for that part of it which consists of the non-structural ceiling material and decoration of the flat below. Similarly with the ceiling of the flat in question, the decorative surface consisting of the laths and plaster or plaster-board will be presumed to belong to the flat in question, but the structure of the ceiling to which this ceiling material is affixed will be deemed to belong to the flat above.

It is, however, desirable in every case to provide specifically where the boundary lies; for, although it may not be material for a good many purposes, there are certain purposes for which the question may be of direct importance. In particular, it may affect first, the question of the extent of the flat owner's liability for repairs (if, as may well be the case, he is required by covenant to keep his own flat in repair). Secondly, it would be very material on the question of insurance when a flat owner insures his flat

[8] [1951] Ch. 808.

individually, for the insurance will in such a case only extend to the flat—whatever that might be.

(2) *Rights of support*

In the case of an upper flat, rights of support are essential. No difficulty usually arises in connection with such rights, since the right of support is a clearly recognised easement in English law.[9] Nevertheless, such rights must be expressly (or impliedly) granted by a person having title to grant them since, unlike the position with adjoining owners of land forming part of the natural surface of the earth, the owner of a building or part of a building has no natural right to the support of his building from any adjoining building or land.[10] In the case of adjoining owners of land consisting of the soil, one owner cannot so excavate his own land so as to cause the land of his neighbour to subside or collapse. But, in the absence of an easement, there is nothing whatsoever to prevent an adjoining owner from removing support from his neighbour's land or building, notwithstanding that the effect of that removal may be to cause the building to collapse. That, therefore, is a matter which the potential flat owner must satisfy himself about.

(3) *Rights of protection from the elements*

Unless the flat owner's flat is a top flat which includes the roof of the building, it will be very material for him to be satisfied that he has a right to insist that the upper part of the building is not so altered as to leave his own flat open to the ravages of the elements. It is therefore common practice in conveyances of flats to insert as an express right a right of protection from other parts of the building. Difficulty immediately arises in this connection because there does not appear to be a decision which has ever considered the question whether such a right of protection is capable of subsisting as an easement. If it is not capable of so subsisting, problems will, of course, immediately arise as between successors in title of the flat requiring protection and the successors in

[9] See *Lemaitre* v. *Davis* (1881) 19 Ch.D. 281, at p. 291.
[10] See *Bonomi* v. *Backhouse* (1858) E.B. & E. 622, at p. 654.

title of the other parts of the building providing the protection. The decision and general attitude of the Court of Appeal in the case of *Re Ellenborough Park*,[11] however, gives considerable encouragement to the view that the common law of easements is capable of adapting itself so as to recognise this type of right as a legal easement.

In order to exist as an easement a right must exhibit the following four characteristics[12]: (a) that there must be a dominant and a servient tenement—this requirement is clearly satisfied in the case of adjoining flats; (b) that the easement must accommodate the dominant tenement—*i.e.*, be connected with its enjoyment and be for its benefit—this requirement is again clearly satisfied; (c) that the dominant and servient owners must be different persons—here again this requirement is satisfied; and (d) that the right claimed must be capable of forming the subject-matter of a grant.

If any difficulty were to arise at all concerning rights of protection from the elements it would arise only in connection with this fourth requirement. But, in view of the general attitude of the Court of Appeal in the *Ellenborough Park* case and of the undoubted social need for the recognition of such rights as easements in circumstances such as these, there is little doubt that if and when the matter comes before the courts they will recognise a right of protection from the elements as capable of existing as an easement.[13]

(4) *Rights of access to the flat*

Unlike the rights of support and protection just referred to, rights of access to the flat will usually fall to be exercised over parts of the building which are not specifically vested in any of the other flat owners, but which are common parts of the premises for the use of all or any of the flat owners and the ownership in which may be vested either in a company or in trustees or in the original developer. No difficulty arises in regard to such rights of access, since a right to use a passageway or corridor and staircase have long

11 [1956] Ch. 131.
12 See *Re Ellenborough Park*, *ibid.*
13 See also *Wright* v. *Macadam* [1949] 2 K.B. 744 (a right to use a coal shed).

since been recognised as legal easements in the case of tenancies [14] and *a fortiori* the principle underlying these decisions would apply to freehold flats.

(5) *Rights in respect of basic services*

Rights to receive water, gas and electricity through pipes, wires and cables situated on another's land and a right of drainage through the drains and sewers passing through another's land have for long been recognised as capable of subsisting as easements and a prospective flat owner will be concerned to see that he will be entitled to enjoy such rights as easements.

(6) *Other rights*

The above rights may be regarded as the absolute minimum to make flat ownership a feasible proposition, but for even reasonable comfort something much more is required. Thus, a potential flat owner would ordinarily be concerned to see whether he has any rights such as a right to use a dustbin or to place a dustbin on any other part of the property or a right to use any coal or fuel storage accommodation or a right to park cars or allow his visitors to park cars within the precincts of the building or, in the more elaborate cases, a right to use a lift and to receive the benefit of certain other services, such as constant hot water and central heating. Difficulty arises in connection with a number of these possible rights. There is no decision recognising as an easement a right to park a car, a right to use a garage, a right to play games (as opposed to enjoying a pleasure ground) or a right to use a lift. Accordingly, whilst it is common in appropriate types of case to include these rights as if they were legal easements, the position cannot be regarded as wholly satisfactory.

Right to use a lift. So far as the right to use a lift is concerned, the question has been dealt with in an article on lifts generally, written by Mr. V. G. Wellings.[15] In the Australian case of *Dikstein*

[14] See *Wright* v. *Macadam*, *ibid.*; *Goldberg* v. *Edwards* [1950] Ch. 247.

[15] "Lifts," 19 (N.S.) *The Conveyancer and Property Lawyer* (1955), pp. 467–482, at p. 477.

v. *Kanevsky* O'Bryan J. doubted whether a right to use a lift was capable of existing as an easement and he said [16]:

> "Any such right is in essence and substance different from a right of way. If the plaintiff has a right of some sort to use the lift, in order that such a right may be of any practical value, the defendant must be under an obligation to service the lift and have it in running order. This involves provision of power, maintenance and supervision and the compliance by him with public requirements. Such a right therefore is essentially a right *in personam* and is not an easement or quasi-easement or a right appurtenant to land which will pass by implication or operation of law upon a grant of an estate in the land."

I would respectfully agree with these observations on the footing that with one exception—namely, the easement of fence—a right cannot or has not so far been recognised to be capable of existing as an easement if it imposes positive obligations upon the servient owner.[17] The positive acts which the running of a lift necessarily involve would seem to make it conclusive on the present run of authorities that a right to use a lift is incapable of existing as an easement. This is one point therefore where, unless the courts are able to stretch the law to cover what is in effect a complete departure from the existing categories of easements, some legislative provision will in due course be required. Again the problem will only be material as between third parties and not as between the original developer and the flat owners, since as between them no doubt some sort of contractual obligation, either express or implied, will exist.

Right to park a car. In regard to a right to park a car in the grounds of the premises there is again—surprisingly—an absence of any direct authority. In *Bulstrode* v. *Lambert* [18] there was a grant of a right of way over certain land "for the purpose of gaining access to the building at the rear" and it was held that such a right carried with it, by necessary implication, a right to halt and load

[16] (1947) V.L.R. 216, at p. 217.
[17] See *Regis Property Co., Ltd.* v. *Redman* [1956] 2 Q.B. 612.
[18] [1953] 1 W.L.R. 1064.

and unload vehicles. This case, however, seems to have proceeded upon the footing that the question was purely one of construction and it did not consider as a matter of substance whether the right of halting was in fact capable of existing as an easement, although since the dispute arose between successors in title to the parties to the original conveyance this question would seem to have been material.

Right to use a garage. A similar problem arises in connection with a right to use a garage. Such a right whilst, of course, it can be the subject of a lease or of a conveyance in fee simple, would seem, prima facie, not to be capable of existing as an easement on the ground that to all intents and purposes it would amount either to exclusive possession of the garage or to joint possession with the owner (or others). It is one of the prerequisites of an easement that it must not exclude the owner of the servient tenement from possession or amount to a right to joint possession. This was clearly laid down in the case of *Copeland* v. *Greenhalf*,[19] where it was held that the right to place vehicles, wheels and other articles used by the plaintiff in connection with his business as a dealer in these articles, was incapable of being claimed as an easement by prescription on the ground that the claim amounted to a claim to the joint user of the land with the owner. On the other hand, in the case of *Wright* v. *Macadam* it was held that as between a landlord and tenant a right to use a coal shed could validly be created under section 62 (1) of the Law of Property Act, 1925, and yet such a right does seem to entail virtually exclusive possession of that part of the shed which the tenant was held entitled to use for storing his coal.

Right to use a pleasure garden. In *Re Ellenborough Park* the question arose as to the effect of a provision in a conveyance of property fronting onto an open space entitling the owner of the property to use the open space. It was argued that such a right could not exist as an easement on the ground that it amounted to a *jus spatiandi* which, it was argued, English law does not recognise. There were, indeed, certain cases which established this point, but

[19] [1952] Ch. 488.

the Court of Appeal (upholding Danckwerts J.) was able to distinguish these cases on the ground that in each of them the claim was based upon prescription, whereas in the present case the right had been expressly granted. This case illustrates the ability of the law to expand and suggests that a wider class of easements may well be able to be created by express grant than by prescription. It is probable, however, that the decision will be fairly strictly confined in its operation and it is doubtful whether it would extend to a right to use part of the garden for the purpose of playing games.

Rights to hot water and central heating. In regard to these rights, there is no question but that such rights are not capable of existing as easements, the question having been specifically before the Court of Appeal in the case of *Regis Property Co., Ltd.* v. *Redman*.[20] In that case there was a covenant in a lease to supply hot water and the question arose whether such a covenant could operate as an easement. It was held that it could not on the general ground that it involved the owner of the servient tenement in the expenditure of money.

It follows that in regard to all the above-considered matters, the rights in question will be enforceable only as covenants and, of course, it is the case (as will be indicated shortly) that covenants are by no means as widely enforceable as are easements.

(7) *The positive obligations of other flat owners and the owners of the common parts*

The next important matter with which a prospective flat owner will be concerned is the extent and nature of the obligations of the other flat owners to do what is necessary to secure to the flat owner the full enjoyment of his flat. For example, he is concerned with the question whether the owners of the lower flats are under an obligation to maintain the main walls of their flats, or if they are not under such an obligation whether any other person, for example, the person in whom the common parts of the premises may be vested, is under any obligation to repair and keep in repair the structure of the building. A similar question arises in connection

[20] [1956] 2 Q.B. 612.

with the obligation of the owners of the upper flats to preserve their property with a view to continuing to provide the protection from the elements to the other flats.

I have already mentioned that these matters can be made the subject-matter of easements so that by virtue of the easements of support and protection every flat owner will certainly have the right to prevent any other owner from doing any positive act to remove such support and protection. But this is a purely negative right for, as has been indicated earlier, it is the characteristic of easements that whilst they entitle the dominant owner to insist that the servient owner does nothing to take away the subject-matter of the right, the dominant owner cannot insist that the servient owner takes any active steps to secure the continuance of the right. In the event of the servient tenement simply falling down or being destroyed by fire, for example, or of the roof of the premises becoming defective, or being destroyed, the easement of support in the one case or of protection in the other would be of no avail to the flat owner.[21]

What he requires is some assurance that in those events the lower parts of the premises will be rebuilt or the roof will be restored. These matters can only be the subject-matter of positive covenants and it is in connection with the enforcement of positive covenants that the weak link in many flat schemes arises.

Maintenance of the structure. The obligation to maintain the structure of the premises, including the roof, may be imposed on one or other of a number of persons. In simple cases, each of the flat owners may assume responsibility for the maintenance of the structure of such part of the building and premises as is comprised in his flat—this would be likely to be the case only where the flat scheme consisted of not more than, say, six units; but in the larger kind of scheme it would usually be the case that a third party, such as the developer himself or, alternatively, a management company or trustees, would take over responsibility for the common parts of the building and premises—staircases, passageways, gardens,

[21] See, generally, *Jones* v. *Pritchard* [1908] 1 Ch. 630; *Sack* v. *Jones* [1925] Ch. 235.

fences and so on, and would also undertake to repair the structure, including those parts of the structure which formed parts of individual flats. Of course, there would be corresponding obligations on the flat owners to make a contribution towards the cost of these repairs.

But the question is, how is any particular flat owner to compel the carrying out of these repairs? If he is left to his remedy under the law of covenants the position is that, whilst the benefit of a positive covenant which touches and concerns the land of the covenantee will run with that land so that a successor in title from the flat owner could certainly enforce the covenant against the original covenantor, at common law the burden of positive covenants does not bind a successor in title of the covenantor. This was established in some powerful *obiter dicta* in the case of *Austerberry* v. *Oldham Corporation*[22] and was the decision of the court in *E. & G. C., Ltd.* v. *Bate*.[23]

It is arguable, however, that this common law rule has been abrogated by statute, in particular, by the provisions of section 79 (1) of the Law of Property Act, 1925. This section provides:

> "A covenant relating to any land of the covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed."

If the effect of a covenant being expressed to be made on behalf of the covenantor and his successors in title is to make the covenant binding upon the covenantor and his successors in title, then certainly the effect of the section is to make the burden of a positive covenant binding upon such successors in title of the covenantor, but it has been decided at common law that no matter how much a covenantor may express himself as intending to bind his successors in title there is a rule of law that successors in title

[22] (1885) 29 Ch.D. 750.
[23] 79 L.J. (1935), p. 203.

cannot be bound. Now prima facie all that section 79 (1) of the Law of Property Act, 1925, intended to do was to shorten conveyances by implying therein words which conveyancers were wont to insert. For although, generally speaking, it was useless for a covenantor to express himself as intending to bind his successors, nevertheless it was common form for conveyancers to add such formulas just in case, in any particular circumstances, they should have effect; and indeed they certainly did have some effect in the case of covenants in leases.

It was held, however, in *Smith and Snipes Hall Farm* v. *River Douglas Catchment Board* (1949) that in relation to section 78 (1) (which does precisely the same thing for the benefit of covenants as section 79 (1) does for the burden) the words, when imported by the section, have greater effect than when they were formerly (or even at the present time) inserted expressly, and that in effect such words now mean what they say. Accordingly, if the principle in that case is equally applicable to section 79 (1), it follows that the words of that section, when imported thereunder (and not inserted expressly), will also mean what they say; in other words, a covenant will bind the successors of the covenantor. So far there has been no decision dealing with the effect on the law of covenants of section 79 (1), but in *Williams* v. *Unit Construction Co., Ltd.* (1951),[24] Lord Tucker said:

> "I would only add that Mr. Blease did advance an interesting argument upon this point which was not addressed to this court in the *River Douglas Catchment Board* case, namely, that if the same meaning is to be given to the words 'successors in title and the persons deriving title under him or them' in section 79, which is a section dealing with the burden of covenants relating to land, serious consequences might follow by making sub-lessees liable for the covenants which had been entered into by their lessors. I express no view with regard to section 79."

The question is therefore still an open question.

[24] Reported only in 19 (N.S.) *The Conveyancer and Property Lawyer* (1955), p. 262.

(8) *Restrictions imposed upon the other flat owners*

The next matter of concern to a flat owner is the question of the restrictions to which the other flat owners (as well as himself) are subject. Clearly, unless the other flat owners are confined in their method of user the tone of the building might rapidly diminish to the detriment of other flat owners. This is the simplest aspect of all in connection with flat schemes, because it has long been established that in regard to restrictive covenants which are imposed on a building estate consisting of a clearly defined area which is laid out in lots, and in which individual purchasers purchase houses subject to substantially common sets of restrictions on the footing that those restrictions are to be mutually enforceable between them, even in the absence of any express covenant between the respective purchasers of houses on the estate *inter se*, each purchaser can nevertheless enforce the covenants entered into by any other purchaser. The principles affecting such enforceability were enunciated in the leading case of *Elliston* v. *Reacher* in 1908.[25] In the case of *Newman* v. *Real Estate Debenture Corporation, Ltd.*[26] in 1941 it was specifically held that the principles of building schemes were applicable to letting schemes in the case of a block of flats which was let off to individual tenants, although in *Kelly* v. *Battershell*,[27] *Newman's* case was described as " the high water mark " of building schemes. Nevertheless, it would seem that in the case of flat schemes which involve a sale of the individual flats as opposed to the granting of a comparatively short tenancy, the courts would at the present day have little hesitation in applying the doctrine in *Elliston* v. *Reacher*, so as to secure the mutual enforceability of restrictive covenants as between the individual flat owners.

(9) *The flat owner's obligations*

The next point of concern to a prospective flat owner is the question of the extent of his own obligations. These naturally will fall into two parts: first his negative obligations, and secondly his positive obligations. So far as the restrictive obligations are concerned they may be expected to be in common form, such as not to

[25] [1908] 2 Ch. 374 and 665 (C.A.).
[26] [1940] 1 All E.R. 131.
[27] [1949] 2 All E.R. 830.

use the premises for any purpose other than a single private dwelling-house, not to hang out washing so as to be visible from outside the flat, not to throw rubbish out of the windows, not to play loud gramophone or other music between the hours of 11 p.m. and 9 a.m., possibly, not to keep domestic animals and so on.

The positive obligations can be reasonably expected to entail an obligation on his part to maintain his own flat in good decorative condition, *may* entail an obligation on his part to maintain such part of the structure of the whole building as is comprised in his own flat and will usually entail the payment by him of a contribution to the persons in whom the common parts of the building are vested towards the maintenance of the common parts and possibly the insurance and maintenance of the structure of the building as a whole. In the ordinary way, his obligation to contribute will be an obligation to pay a rateable proportion, according to the value of his interest in the building, of the total cost of the services, based upon an estimated amount or the actual costs for an earlier period.

(10) *Insurance*

He should also be careful to look into the question of insurance. If there is a management company or trustees or some other person who is in charge of, and responsible for, the common parts of the building—and possibly also for the repair of the structure of the building, including the parts of the structure which are comprised within the individual flats—then the probability is that the management company or trustees (as the case may be) will themselves have undertaken responsibility for the insurance of the block as a whole and that each individual flat owner will be under an obligation to contribute a proportionate part—according to the value of his flat—of the premium. If this is the case then, subject to the prospective flat owner being satisfied that the terms of the policy in question are sufficiently comprehensive to cover his requirements, he has no further need to pursue the matter.

But in many cases flat schemes leave it to the individual flat owners to effect their own insurance—very often in the joint names of the flat owner and the management company or other body having responsibility for the administration of the block as a whole.

If this is the case, then it may be important to secure that the policy covers not only loss or damage to the flat itself but also loss or damage caused by negligence to any or all of the adjoining flats, because it is quite obvious that if a fire should be negligently started in one flat and get out of hand, it is likely to spread to other parts of the building resulting in damage which goes beyond the value of the flat where the fire originated. In such circumstances, it is quite clear that there can be liability on the part of the flat owner in whose flat the fire originated as the result of an act of negligence for the damage caused to other parts of the building. This was established in the case of *Balfour* v. *Barty-King* [28] and is something to which sufficient general attention has so far not been drawn. It is also important to see, where insurance is left to the individual flat owners, that some provision is made for the insurance of those parts of the building which are not comprised in any of the flats such as passageways, staircases, outhouses, possibly the roof of the premises, and so on.

Weaknesses of Flat Schemes

Having thus reviewed some of the more important aspects of ownership of a flat from the legal point of view, it now remains to consider whether they are any general weaknesses and if so where they lie. In dealing with various matters such as covenants and easements, I have already hinted at certain weaknesses. A flat scheme is one in which a number of individuals or families who are strangers to each other are collected together in a confined precinct. Clearly, the success or failure of such a scheme is necessarily going to depend upon the extent to which a flat owner's neighbours are going to "play the game" or, in the last resort, the extent to which, if they do not willingly do so, they can nevertheless be obliged to play the game. The latter alternative is never so satisfactory as voluntary co-operation and the fact is that in those flat schemes which have been inaugurated since the war there has been precisely that degree of co-operation which has led to schemes being—as far as it has been possible to see—completely successful

[28] [1957] 1 Q.B. 496.

and so far, no cases have come before the courts involving major disputes between individual flat owners. Nevertheless, difficulties cannot be expected to arise in such a relatively short period as that which has elapsed since most of the post-war schemes were put into operation. It takes some sort of misfortune or disaster or social upheaval or social change to bring about the conditions in which disputes are likely to arise; in which, in other words, there are likely to be flat owners who refuse, or are unable, to pull their weight and where, therefore, the question of resort to legal proceedings is going to arise.

Again, whilst at the outset it can, within limits, be reasonably assumed that the type of person who is going to occupy the various flats will have some sort of common outlook and common standard, events may make the group a much more heterogeneous body. It may be found that different flats are occupied by persons of different nationalities or different creeds or different races, and in the present state of human nature it is clear that these factors are likely to give rise to considerable dissension and disagreement and genuine disparity of outlook as to what is important in general living. There have been some flat schemes (where, however, the objects of the developers has been to let off the flats for relatively short terms) in which attempts have been made to impose restrictive covenants restricting assignments of the leases to persons of certain creeds, colours or nationalities. Although the matter has not come before the courts in this country there can be little question but that restrictions of this kind, if directly imposed, would be void on the ground of public policy. Precedents of clauses are available, however, which may be used to secure this end by indirect means,[29] but such clauses are clearly inappropriate in the case of long leases of flats, where the tenant is not likely to be prepared to tie himself down for a long period on such conditions and would not seem to be applicable in the case of the sale of the freehold of a flat.

It is clear, therefore, that the individual flat owners must be prepared for a certain amount of give and take. But at least they do wish to be assured, independently of the character, nationality or creed of their neighbours and changes in the amenity generally,

[29] See 15 (N.S.) *The Conveyancer and Property Lawyer* (1951), p. 552.

that they do get that which they contracted—or thought they had contracted—to buy; that is to say, a right to expect that their flat will continue to be supported and protected and a right to expect other flat owners to observe the restrictions and obligations which have been imposed upon them. So far as the former are concerned, I have already indicated that there is no difficulty in regard to rights of support and probably little doubt in regard to rights of protection from the elements. But there is real doubt in regard to such matters as the right to use a lift, the right to park a car and the right to play games on part of the premises.

Further, the extent to which a flat owner can secure the enforcement of positive obligations entered into by other flat owners can only be described as doubtful. If the failure to repair on the part of one of the other flat owners adversely affects his neighbour, then that neighbour cannot in the ordinary way enter and do the repairs himself, unless, indeed, such repairs are necessary in order to secure the continued enjoyment of some easement, such as the easement of support. But even if this is the case, and, for example, the owner of an upper flat exercises his right to repair a lower flat in order to preserve his right of support from the lower flat, there is no right to recover any part of the expense of the repairs from the owner of the lower flat, notwithstanding that the value of the lower flat is thereby increased. There is, in English law, no such doctrine as the doctrine of *negotiorum gestio*, which exists in Roman law, in which if, in certain circumstances, work were done on another's land which increased the value of that land, the person doing the work would be entitled to recover the amount of the increase in value notwithstanding that he had embarked upon the work wholly unasked.

Apart from historical accident, there seems no real ground whatsoever for distinguishing between the enforceability of the burden of restrictive covenants against assignees, on the one hand, and the enforceability of the burden of positive covenants against assignees, on the other, and there is a good deal to be said for a short statutory measure which would secure similar enforceability for both types of covenant. Further, whilst historically the general principle is that an easement will not be recognised if it entails the expenditure

of money on the part of the owner of the servient tenement, and whilst this may be a perfectly sound principle in regard to easements which are claimed by prescription, it may be doubted whether the same principle should be applied at the present day to easements which are entered into expressly by parties receiving skilled advice. It is my submission that the law relating to building schemes should be extended to positive covenants if, indeed (as is generally assumed), it does not so extend.

If the law relating to the enforceability of positive covenants were altered so as to provide for the binding force of such covenants against successors in title of the covenantor, and persons claiming through or under the covenantor, then there would be no need whatsoever to extend the class of easements to those cases where the requirements of flat schemes demand the performance of positive obligations on the part of the servient owner. In effect, the recognition of positive covenant enforceability would be tantamount to the recognition of as many completely new types of easement as the ingenuity of the draftsman of the positive covenants could give birth to. If any such statutory provision as that referred to above were introduced, it would presumably not provide for enforceability against the land itself (as is the case, for historical and not entirely logical reasons, with easements) but against a specified class of persons who could be said to come within the scope of the original covenant.

Notwithstanding the desirability of such legislation, however, I rather suspect that nothing is likely to be done so long as flat schemes are in fact running smoothly. If and when Mrs. Smith, the occupier of a flat, writes to her M.P. complaining that her flat is being rendered ruinously damp by the failure of her neighbour in an upstair flat to repair his window, and the pressure gets sufficiently strong, then no doubt Parliament will act. In the meantime, purchasers of flats can comfort themselves with the reflection that the more flats that go up—and their number is daily increasing—the more chance there is of ultimate legislation if and when problems of the sort considered above do in fact arise. It is certainly a compliment to the common law that it has proved itself to be capable of being adapted to meet the needs of this new form of living without legislation.

SCOTS CASES AND RECENT ENGLISH DECISIONS

G. J. Webber

To most English lawyers, Scots cases are almost a sealed book; decisions from the courts of the Commonwealth and of the United States are more frequently cited. This is intelligible, for, as writers upon the Scottish legal system never tire of declaring, Scots law is "radically different" from English law. Scots law, Professor D. M. Walker has recently written, "under the influence of different agencies, frequently arrives at results not dissimilar to those of English law but from very different premises and by a very different train of reasoning." [1] Quite apart from terminology and procedure, he points out, the principles and content of the rules differ in the two systems: most noticeably in property law; less in family law, in reparation and in contract; least in mercantile and industrial law; "quite substantially" in public law, constitutional and administrative law; "very materially" in criminal law; "at its least" in taxation. In its reliance on broad principles, Scots law, he continues, "shows affinity with civil law systems of the Continent rather than with the Anglo-American common law."

Professor T. B. Smith, in expounding the sources of Scots law,[2] draws attention to the two respects in which Scots Acts differ from the statute law of England: *first*, in liberal rather than literal interpretation; *secondly*, their liability to repeal upon proof of desuetude and contrary practice. And this crucial difference he observes upon judicial precedent: "The powers of the Court of Session to review a questionable precedent in a fuller court specially convened for the purpose, and to re-orientate the law in accordance with current social needs, gives the system greater flexibility than that of England." [2]

[1] David M. Walker, *The Scottish Legal System* (1959), at p. 66; see also p. 67.
[2] *The Development of the Laws and Constitutions of Scotland* (British Commonwealth series) (1955), pp. 625, 630. And see, generally, Chap. 23, at pp. 622–637, on "The Formal Sources of Scots Law," and his most stimulating monograph, *The Doctrines of Judicial Precedent in Scots Law* (1952).

Justly jealous of retaining unimpaired its own traditions—as Viscount Dunedin and Lord Normand, Lord Macmillan and Lord Cooper have each, with powerful eloquence, severally reasoned—has Scots law any relevance for the English lawyer of today? [3]

Two Ways of Thinking

Granting to the full the differences in origins, influences, methods and content—which will be found set forth with lucidity and vigour in the writings of Professor T. B. Smith and Professor D. M. Walker—the English law reports contain some notable instances of the value of the reasoning in Scots cases. To consider some recent examples is the purpose of this paper. But before doing so, some general observations upon Scottish legal technique may be relevant. To avoid trespassing upon ground over which an English lawyer may have no right to pass, one cannot do better than quote a passage from an eloquent address entitled "The Common and the Civil Law—a Scots View," by the late Lord Cooper, Lord President of the Court of Session, and "probably the outstanding Scottish judge of our time" [4]:

> "The civilian naturally reasons from principle to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents.
>
> . . .
>
> "The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the Common Law with its pedigree. The instinct of the civilian is

[3] Viscount Dunedin, *The Divergencies and Convergencies of English and Scottish Law* (1935), at p. 28; Lord Normand, *Scottish Judicature and Legal Procedure*, Presidential Address to the Holdsworth Club (1941), at p. 4; Lord Macmillan, "Two Ways of Thinking," in *Law and Other Things* (1938), pp. 76–101; Lord Cooper, "The Common and the Civil Law—A Scots View," 63 Harv.L.R. (1950), pp. 468, 471; "Scottish Legal Tradition," in *Selected Papers* (1959). And see Lord Keith of Avonholm, *The Spirit of the Law of Scotland*, Presidential Address to the Holdsworth Club (1957).

[4] T. B. Smith, "The Contribution of Lord Cooper of Culross," *Juridical Review* (1955), pp. 249–270, at p. 249; reprinted in *Collected Papers* (1959), pp. xix–xlix, at p. xxix.

to systematise. The working rule of the Common Law is *solvitur ambulando*." [5]

Now this, perhaps, is an overstatement of the contrast which may partly be a matter of emphasis. Does not the common lawyer work with principles and not merely from instances? In modern times, no less than the civilian, he too—perhaps not so explicitly—is thinking in terms not merely of remedies but also of rights and duties. True although it is that he is concerned with the pedigree of the law and his working rule is *solvitur ambulando*, yet today the common lawyer hardly less than the civilian is deeply concerned with " the policy and rationale " of a rule of law.

Where Both Systems Meet

It is illuminating to observe and compare the reasoning of the judges of the Court of Session with the reasoning of judges in the High Court, the Court of Appeal and the House of Lords.

At the outset, briefly and by way of illustration, one may mention some of the topics on which it will be profitable to examine " the two ways of thinking."

First, " diminished responsibility "—a concept borrowed from Scots law and imported into English law by the Homicide Act, 1957, s. 2 (1).[6] Secondly, " hysterical amnesia ": whether it renders an accused unfit to stand his trial.[7]

Thirdly, the decision in *Gourley's* case [8] that in estimating loss of earnings as an element of damages in an action for personal injuries, the tribunal must take tax into account, is expressly based upon the reasoning of Lord Sorn in *M'Daid* v. *Clyde Navigation Trustees*.[9] Fourthly, on income tax law it is the practice of the

[5] Cited at p. 67 of Walker, *The Scottish Legal System* (1959), from 63 Harv.L.R. (1950), p. 468, at p. 471; see also " Scottish Legal Tradition," in *Selected Papers* (1959), pp. 197–198, 199. And see " The Development of the Law," an Address by Lord Clyde, Lord President of the Court of Session, 72 *Scottish Law Review* (1956), pp. 1–9.

[6] *R.* v. *Spriggs* [1958] 1 Q.B. 270, 274–276, quoting *in extenso*, and applying, Lord Cooper's charge in *H.M. Advocate* v. *Braithwaite*, 1945 S.C.(J.) 55, 56–58.

[7] *R.* v. *Podola* [1960] 1 Q.B. 325.

[8] *British Transport Commission* v. *Gourley* [1956] A.C. 185, 203, *per* Lord Jowitt; 209, 217, *per* Lord Goddard.

[9] 1946 S.C. 462, 464.

High Court and the Court of Appeal to follow Scottish decisions.[10] Fifthly, in the interpretation of statutes common both to England and to Scotland—statutes upon such subjects as landlord and tenant, the closing of shops, adoption, road traffic—English courts regard Scottish decisions as of high persuasive authority.

Finally, in perusing the law reports, one can discover a number of topics—*e.g.*, the incidence of liability for borrowed servants, the employer's duty of care, "proper precautions" to be taken by an employer—where Scottish decisions have been cited and followed. Although artificial insemination of a wife by a donor has never been considered by an English court in any reported case on adultery, the question arose and was decided by the Court of Session in *MacLennan* v. *MacLennan*.[11] If the question does arise in an English court, it seems likely that Lord Wheatley's opinion that A.I.D. is not adultery according to the law of Scotland would be followed in England.

(1) *Diminished responsibility*

The concept of "diminished responsibility," as set out in section 2 (1) of the Homicide Act, 1957, has expressly been borrowed from Scots law—as Lord Goddard C.J. explained in *R.* v. *Spriggs*.[12]

The judgment contains an ample quotation from the charge of Lord Cooper, Lord Justice-Clerk, in *H.M. Advocate* v. *Braithwaite*,[13] who had cited with approval from the charge of Lord Alness, Lord Justice-Clerk, in *H.M. Advocate* v. *Savage*[14]:

[10] *Forbes' Trustees* v. *Inland Revenue*, 1958 S.C. 177, followed by Court of Appeal in *Abbott* v. *Philbin* (*Inspector of Taxes*) [1960] Ch. 27; reversed by House of Lords [1960] 3 W.L.R. 255.

[11] 1958 S.C. 105–115, and see at p. 113 for Lord Wheatley's opinion. See also Report of the *Departmental Committee on Human Artificial Insemination* (1960), Cmnd. 1105, paras. 73–76. Lord Merriman P., in the House of Lords Debate on February 26, 1958, accepted Lord Wheatley's opinion (para. 76). The *MacLennan* decision in January 1958 was the occasion which gave rise to the appointment of the Committee.

[12] [1958] 1 Q.B. 270, 272; *arguendo*, 274–276. See Lord Keith, "Some Observations on Diminished Responsibility," *Juridical Review* (1959), p. 109.

[13] 1945 S.C.(J.) 55.

[14] 1923 S.C.(J.) 55 ("A comparatively recent doctrine," at p. 50). See Lord Normand's short account of the history of the doctrine in *Kirkwood* v. *H.M. Advocate*, 1939 S.C.(J.) 36, 39, 40: "The degree of impaired responsibility is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and, if not sane, is not responsible. It is a modern variation of that basic doctrine, justified in each case by medical testimony directed to the special facts of the case."

> " that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on though not amounting to insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility . . . there must be some form of mental disease."

In *R.* v. *Dunbar* [15] the Court of Criminal Appeal held that the burden on the defence is not as heavy as the burden on the prosecution, Lord Goddard saying:

> " That this is the law of Scotland as well as the law of England is clear from *Braithwaite's* case. . . ."

The recent tendency of the English courts is to extend the ambit of the defence of diminished responsibility; the jury are not bound by the medical evidence but may take into account the acts and statements of the accused and his demeanour: *R.* v. *Byrne*.[16] A verdict of capital murder was set aside when there was unchallenged evidence that the appellant was within the category of diminished responsibility and no evidence that he was not, and a verdict of manslaughter was substituted: *R.* v. *Matheson*.[17] In one respect the court has departed from Scots practice; that a plea of guilty to manslaughter should not be accepted, though it may be in Scotland: *Kirkwood* v. *H.M. Advocate*.[18] As in insanity, the issue must be left to the jury. Of a recent charge to the jury by Paull J.[19] the Court of Criminal Appeal said that his words " closely approximated to the passage from the direction given by Lord Cooper in *H.M. Advocate* v. *Braithwaite*." [20]

Lord Normand's judgment in *Carraher* v. *H.M. Advocate* [21] has not yet been cited in English cases but may one day become relevant. The point was the effect of drunkenness which does not excuse or palliate unless it is so extreme as to deprive the person

15 [1958] 1 Q.B. 1, 9, 10.

16 [1960] 2 Q.B. 396, at p. 404, *per* Lord Parker C.J. And see at pp. 402–404 for the background and interpretation of the statute, and Note in 77 L.Q.R. (1961), p. 15.

17 [1958] 1 W.L.R. 474, 479, 480.

18 1939 S.C.(J.) 36.

19 " Well, really it may be that he is not insane, but he is on the borderline, poor fellow. He is not really fully responsible for what he has done," *R.* v. *Walden* [1959] 1 W.L.R. 1008, 1012, *per* Hilbery J.

20 1945 S.C.(J.) 55.

21 1946 J.C. 108, 118.

affected of the capacity to form an intent to kill or do grievous bodily harm. If he is suffering from a "psychopathic personality" and by taking alcohol he brings about a condition of diminished responsibility, that will not excuse him:

> "I am of opinion that the plea of diminished responsibility, which, as was said in *Kirkwood's* case,[22] is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded it in the decisions."

(2) *Hysterical amnesia*

For the first time in English law, *R.* v. *Podola*[23] raised the question whether hysterical amnesia covering the events which are the subject of indictment render an accused unfit, on the ground of insanity, to stand his trial.

The question arose under section 2 of the Criminal Lunatics Act, 1800, which states that if a person should be insane and, on arraignment, is so found that he cannot be tried, the court may order him to be kept in custody until H.M.'s pleasure may be known.

Scottish authorities were cited in argument on both sides, and the full Court of Criminal Appeal, at the close of the judgment delivered by Lord Parker C.J., quoted extensively from the opinions in *Russell* v. *H.M. Advocate*.[24]

Podola was tried for the capital murder of a police sergeant in the course of his duty. The defence was that the day after arrest he had lost his memory of all the events before the homicide. Of this preliminary issue, upon whom was the onus of proof, and what was the standard? And if it *were* proved, would that render the accused unfit to stand his trial?

Upon the trial of the preliminary issue, Edmund Davies J. ruled that the onus was on the defence, but that it was sufficient to show, on the balance of probabilities, that Podola was unfit to stand his trial.[25] The jury, having heard medical evidence, found that the

[22] 1939 J.C.(J.) 36. See also *Kennedy* v. *H.M. Advocate*, 1944 J.C. 171.
[23] [1960] 1 Q.B. 325. See "Scots Law in the *Podola Case*," 76 *Scottish Law Review* (1960), pp. 1–4.
[24] 1946 S.C.(J.) 37.
[25] [1960] 1 Q.B. at pp. 330, 331. Approved at pp. 350, 351. The court cited the *Russell* case, from the opinion of Lord Cooper: 1946 S.C.(J.) 37, at p. 44.

defendant was not suffering from genuine loss of memory. They were then directed that it was their duty to say that he was fit to be tried. They found accordingly. Podola was tried, found guilty and convicted. He did not appeal but a petition was submitted. The Home Secretary referred the whole case to the Court of Criminal Appeal under section 19 (*a*) of the Criminal Appeal Act, 1907, in order that they might consider the question of the onus of proof. The court held that in all cases where a preliminary issue of the accused's sanity was raised, the burden of proof was on the party raising it, whether the prosecution or the accused. The jury must be satisfied on the balance of probabilities that insanity was made out.

In *H.M. Advocate* v. *Brown* [26] Lord Dunedin, the Lord Justice-General, had said that insanity means that which

> " prevents a man from doing what a truly sane man would do and is entitled to do—maintain in sober sanity his plea of innocence, and instruct those who defend him as a truly sane man would do . . . but that is not enough. There is something which is not generally asked about, that is that the person who is giving these instructions should not only intelligently, but without obliteration of memory as to what happened in his life, give a true history of the circumstances of his life at the time the supposed crime was committed."

But in that case, apart altogether from loss of memory, Brown was insane and incapable of pleading to the indictment.

In the *Russell* case, a woman charged with a series of frauds over a number of years had pleaded in bar of trial, hysterical amnesia and that she was unable to plead or give instructions for her defence. She said she had no recollection of events during the relevant seven years. Lord Sorn held a preliminary inquiry but rejected the plea in bar, saying:

> " She is able to instruct, in my opinion, a defence, even though that defence has the peculiarity of including in its features, that the accused has forgotten the period of the events dealt with in that charge. . . . The Crown must prove their

[26] 1907 S.C.(J.) 67, 77.

> case, and must prove it to the satisfaction of the jury, and the accused can tell the jury that she has no recollection of these events." [27]

On appeal, the court held that hysterical amnesia was no ground for supporting the plea in bar. The judgment was delivered by Lord Cooper, Lord Justice-General. The only grounds, he said, associated with the abnormal personal condition of the accused which are recognised in Scots law for a plea in bar, are (a) insanity, and (b) the condition of a deaf mute [28]:

> "There is no trace in either Scotland or England of a plea in bar founded upon loss of memory by a sane and otherwise normal accused person."

The dicta in *Brown's* case did not apply to a sane prisoner, for then "they would come near to paralysing the administration of criminal justice." [29]

(3) *Damages and tax*

It may not generally be remembered that the majority decision of the House of Lords in the *Gourley* case [30] explicitly followed a Scots decision, and that Lord Keith, who dissented, also followed a Scots decision—one of his own. In an action for personal injuries, where a sum is allowed for loss of earnings, the tax position must be taken into account and the amount must be reduced by the income tax and surtax for which the plaintiff would be likely to have become liable. Gourley had been awarded £37,720 damages in respect of loss of earnings actual and prospective, but the House held, despite the hitherto "inveterate practice" to the contrary, of treating the incidence of taxation as *res inter alios acta*,[31] that the trial judge ought to have taken the tax position into account and that the award should be reduced to £6,695. The majority accepted

[27] 1946 S.C.(J.) 40. [28] 1946 S.C.(J.) 46.
[29] *Ibid.* at p. 47.
[30] *British Transport Commission* v. *Gourley* [1956] A.C. 185.
[31] *Per* du Parcq J. in *Fairholme* v. *Firth & Brown, Ltd.* (1933) 149 L.T. 332, 333, followed by the Court of Appeal in *Billingham* v. *Hughes* [1949] 1 K.B. 643, which had considered, but gave a reasoned rejection of, the Scots case to the contrary. See *per* Tucker L.J. at p. 649, *per* Singleton L.J. at p. 652, and, in particular, at p. 653, and *per* Birkett J. at pp. 654, 655.

the reasoning of Lord Sorn in *M'Daid* v. *Clyde Navigation Trustees*[32] that to ignore the tax was "out of touch with reality." With income tax at 11s. (as it then was), "such a direction would seem to a jury just like telling them to give the pursuer twice the amount of the loss. . . ." The House, said Earl Jowitt, should not be deterred either by "the risk of confusion arising if the tax position be taken into consideration," or by "the inveterate practice of the courts in not considering the tax position."[33]

Shortly after Lord Sorn's decision, Lord Keith, in *Blackwood* v. *Andre*,[34] disagreeing with Lord Sorn's reasoning, had decided that no deduction for tax should be made from the amount awarded in respect of loss of earnings: "The court, in my opinion, has no concern with the incidence of taxation in assessing the damages of an injured taxpayer." In the *Gourley* case, Lord Keith, "considering afresh" the opinion he had expressed in *Blackwood* v. *Andre*, dissented.[35] He concluded:

> ". . . income tax is an annual tax imposed by the will of Parliament. To fix damages on an estimate of future taxation is impossible and to assess them *de futuro* on the basis of existing taxation savours of legislation by the judiciary. Further to fix them on the basis of existing taxation without any knowledge of what the future commitments and obligations and personal status of the injured person will be, or would have been, seems to me to be unreal. On all counts the safe and simple rule, in my opinion, is to exclude the element of taxation from the assessment of damages."

The reasoning of Lord Keith, with great respect, may well be thought to be the sounder.[36] However that be, the point remains

[32] 1946 S.C. 462, 464.
[33] [1956] A.C. 185 at pp. 202, 203. Thus, also, *per* Lord Goddard at p. 207.
[34] 1947 S.C. 333, 333–334.
[35] [1956] A.C. 185 at pp. 216–218, and see examples given at p. 216.
[36] On this subject, see *Law Reform Committee Scottish Report*, Cmnd. 501 (1958) and a critique by J. A. Jolowicz, "Damages and Income Tax," Camb.L.J. (1959), pp. 86–98, and T. B. Smith, S.L.T. (1956), p. 13 (cited by Jolowicz).
The Scottish view on the *Gourley* case is discussed in 75 *Scottish Law Review* (1959), pp. 122, 126, 127, by "H.M.," commenting upon the *Sixth Report of the Law Reform Committee for Scotland*, Cmnd. 135 (1957):
"The doctrine in *Gourley* tends in favour the employer, who is encouraged to dismiss his employee and have the damages reduced rather than to let him

that it was the reasoning in a Scots case that ultimately persuaded the majority in *Gourley's* case.

(4) *Income tax*

In income tax cases generally, the English courts have regard to decisions of the Court of Session. Thus, in *Wiseburgh* v. *Domville* (*Inspector of Taxes*),[37] where a manufacturer's agent had compromised an action for wrongful dismissal against a company under which the agent received a lump sum of £4,000, the General Commissioners decided that the sum was taxable profits for the year in which it was actually received. Harman J., following a Scots case in which Lord Normand gave the leading judgment,[38] dismissed the appeal on the ground that the sum represented income corresponding to commission between the breach and the due ending date. His decision was affirmed by the Court of Appeal.

The English courts habitually pay great regard to decisions of the Court of Session, which are treated as of high persuasive authority. Recently, indeed, in a tax case, the Court of Appeal felt bound to follow such a decision[39] even though two members expressed grave doubts whether it was correctly decided.

In *Abbott* v. *Philbin* (*Inspector of Taxes*)[40] Lord Evershed M.R. said:

> "The question before the Scottish court is the same as the question before us. . . . It is, of course, quite true that we in this court are not bound to follow the decisions of the Court of Session, but the Income Tax Act and the relevant Finance Acts apply indifferently both north and south of the border, and if we were to decide those questions in a sense diametrically

go and pay him what he is entitled. . . . In any event, if the tax question is to be looked to, why should the courts steadfastly refuse to recognise the existence of insurance?"

The *Gourley* rule was not applied in *Spencer* v. *MacMillan Trustees*, 1959 S.L.T. 41, since the first requisite, *viz.*, that the payment would have been liable to tax, had not been fulfilled.

37 [1955] 1 W.L.R. 1287; [1956] 1 W.L.R. 312, 319, 320, *per* Lord Evershed M.R.

38 *Kelsall Parsons & Co.* v. *Inland Revenue*, 1938 S.C. 238; (1938) 21 T.C. 608.

39 *Forbes' Trustees* v. *Inland Revenue Commissioners*, 1958 S.C. 177.

40 [1960] Ch. 27, 33. See also the conclusion of Harman L.J.'s judgment, at 52: "For reasons of policy it would not be right that this court should express a diametrically opposite view."

> opposite to the sense which appealed to the Scottish judges, we should lay down a law for England in respect of this not unimportant matter which was completely opposite to the law which was being applied on exactly the same statutory provisions north of the border. I cannot think that that is right. In a case of a revenue statute of this kind it is the duty of this court, unless there are compelling reasons to the contrary, to say, expressing such doubts as we feel we ought to do, that we should follow the Scottish decision."

Lord Evershed did not define the "compelling reasons to the contrary"; he may have been thinking of the exceptions laid down by the Court of Appeal in *Young* v. *Bristol Aeroplane, Ltd.*[41] In a Note in the *Law Quarterly Review*[42] Dr. Goodhart observes: "There is much to be said for uniformity of decision in the two courts, but, on the other hand, this conclusion deprives the House of Lords of some help in making its own decisions." In that case the court "discouraged counsel for the taxpayer from pursuing the whole of his argument." The House of Lords likes to have the reasoned judgments of the Court of Appeal; "but this will not be possible if the court below is bound to follow a Scottish precedent, even though it may have been clearly of the opinion that it is wrong. In such an instance uniformity may be bought at too high a price."

Leave was given to appeal to the House of Lords which, by a majority, overruled *Forbes'* case.[43] Viscount Simonds said that the Court of Appeal "took the proper course in following *Forbes'* case since the two cases were not materially distinguishable." Thus, also, Lord Reid: "The Court of Appeal, though not bound to do so, very properly followed the decision of the Court of Session in *Forbes* . . . . I say very properly because it is undesirable that there should be conflicting decision on revenue matters in Scotland and England." And Lord Denning (who dissented) said: "The Income Tax Acts apply to England and Scotland alike, and there is the highest authority for saying that they must, if possible, be so

41 [1944] K.B. 718.
42 70 L.Q.R. (1960), pp. 182, 183.
43 [1960] 3 W.L.R. 255; [1960] 2 All E.R. 763, 767, 771, 778.

interpreted as to make the incidence of taxation the same in both countries."

In *Forbes'* case an option to buy shares was held to be taxable in the year when the option was *exercised*. This decision was reversed in *Abbott* v. *Philbin* when the House held that the taxable year was the year of the *grant* of the option, *i.e.*, when a valuable right was *acquired*.[44]

In *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*[45] the House of Lords held that when a life policy was taken out by the deceased and assigned to his son absolutely, no "beneficial interest" in the policy arose on the death of the deceased, for the assignee had a beneficial interest as soon as the policy had become assigned to him. Viscount Simonds referred to *Lord Advocate* v. *Hamilton's Trustees*,[46] saying that "the argument in Lord Wark's opinion sets out a course of reasoning which I accept and apply in the present case." In that case, life policies were held by the trustees for the four children of the father equally. The three sons had a vested right to the capital, and the daughter a vested interest in the life-rent before her father's death. No estate duty on the proceeds of the policies was held to be payable on the father's death.

These two cases were followed by Harman J. in *Re Barbour's Policies of Assurance*,[47] holding that, there being a life interest in possession while the settlor was still alive, no estate duty was payable. His decision, reversed by the Court of Appeal, was restored by the House of Lords (Lord Radcliffe dissenting), approving the Scots case and applying the *D'Avigdor-Goldsmid* decision.[48]

[44] Upon the principle that the law of income tax must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries, see *per* Lord Halsbury L.C. and Lord Watson, in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531, 548, 557.

See also *per* Viscount Simon L.C. in *Income Tax Commissioners for City of London* v. *Gibbs* [1942] A.C. 402, 414, and *per* Lord Macmillan at 419: "The Income Tax Acts are Imperial statutes equally applicable on both sides of the border and the language which they employ ought to be construed so as to have, as far as possible, uniform effect in England and in Scotland alike."

[45] [1953] A.C. 347, 363, 364, *per* Lord Porter; 373, 374, *per* Lord Morton of Henryton, citing from the opinion of Lord Keith in the *Hamilton Trustees* case.

[46] 1942 S.C. 426, 434, *per* Lord Keith, affirmed at 443, 444, *per* Lord Wark.

[47] [1956] Ch. 66, 67.

[48] [1957] 2 All E.R. 745, 751, *per* Lord Morton of Henryton; 754, *per* Lord Reed; 758, *per* Lord Keith.

The very recent case of *Burdett-Coutts* v. *Inland Revenue Commissioners*[49] involved a reduced rate of estate duty upon the death of a partner where estate duty had become payable twice in five years. Buckley J. found it desirable to distinguish *Glen* v. *Inland Revenue*,[50] where Lord Clyde, Lord President, had stated the rules where the reduced rate was applicable. The practice had been recognised in leading textbooks on death duties, and the observations were said to be the basis of departmental practice in similar cases under the Finance Act, 1954, s. 28 (1).

(5) *Unified interpretation of common statutes*

In interpreting statutes common to England and Scotland, the English courts have held that a unified interpretation is desirable and in several instances have followed Scots cases.

1. *Statutory licence exceeded.* In *Young* v. *Buckles*[51] a claim was made for a sum beyond the amount licensed (under the Defence Regulations) in a building contract. An architect and surveyor, employed to obtain a building licence for work, which was granted at £525, and to superintend the work, put in his bill for £700. This included further work for which a licence had not been obtained. He claimed £48 professional charges for the £525 work. The defendant contended that the sum must be paid out of the amount of the licence. The Court of Appeal held that "professional charges" came outside the scope of the licence required: they were not for "services used" for the work, within the meaning of Defence (General) Regulations, Reg. 56A, paragraph 4, and were, therefore, recoverable. But in any event, the court, approving *J. Dennis & Co., Ltd.* v. *Munn*[52] and the Scots case *Jamieson* v. *Watt's Trustees*,[53] thought that where the licence was exceeded, the illegality extended only to the excess.

2. *Construction of Bread Order.* In a decision upon the Bread Order, 1953, *Trickers (Confectioners) Ltd.* v. *Barnes*,[54] where

[49] [1960] 3 All E.R. 153, 155–158.
[50] 1926 S.C. 44.
[51] [1952] 1 K.B. 220, 230, *per* Lord Evershed M.R.; 231, *per* Hodson L.J.
[52] [1949] 2 K.B. 327, 333, *per* Jenkins J.
[53] 1950 S.C. 265.
[54] [1955] 1 All E.R. 803, 807.

persons had been charged with having in their possession a loaf deficient in weight, the defence was that the deficiency was due to the act of someone over whom the appellants had no control. Lord Goddard C.J. followed a Scots case, *M'Intyre & Son* v. *Laird*,[55] decided under a similar section of the Sale of Food (Weights and Measures) Act, 1926. The Divisional Court held as a matter of construction that if the deficiency were due to the action of someone over whom the seller had no control, there was no need to show that " all reasonable precautions " were taken and " all due diligence " exercised.

" In any case," he declared, " if there is a decision of the High Court of Judiciary which deals with these matters on the other side of the Border, we in this court always try to decide in the same way."

3. *Road traffic.* Similar, but even stronger, observations were made by Lord Goddard C.J. in a case arising out of the Road Traffic Act, 1930: *Cording* v. *Halse*.[56] Was a lorry a " heavy motor-car " within Reg. 61 of the Motor Vehicle (Construction and User) Regulations, 1951? If so, there was a breach of the regulation that the unladen weight should be marked on it together with the maximum permissible speed and the display of a disc bearing the number " 20." Now the definition of " heavy motor-cars " under section 2 (1) of the Road Traffic Act, 1930, excludes a vehicle constructed or adapted for use for the conveyance of goods, of which the maximum weight unladen does not exceed three tons. The unladen weight of the lorry in this case *without* a large box-like container attached to a flat wooden platform and used when animals were being conveyed but not otherwise, was *under* three tons. *With* the container, the unladen weight was *over* three tons.

The Divisional Court held, following the Scots case of *M'Cowan* v. *Stewart*,[57] that the container was not an " alternative " body and was therefore not to be included in the weight under section 26 of the Road Traffic Act, 1930. It was " additional " body; no

[55] 1943 J.C. 96, 104, *per* Lord Justice-Clerk, Lord Cooper, and at 178, *per* Lord Wark.
[56] [1955] 1 Q.B. 63.
[57] 1936 S.C.(J.) 36.

breach of the regulations had therefore occurred. Lord Goddard thought:

> "That was just the sort of thing that the Act, in referring to alternative bodies, was meant to deal with. The difficulty, however, is this: in 1936, in *M'Cowan* v. *Stewart*, this very point came before the Court of Justiciary. That case is indistinguishable in any material respect from the present. . . . In that case, which was heard before a Full Bench of seven Lords of Justiciary, the court by a majority of six to one put a very strict construction on the word 'alternative' in section 26, and held that it was not an alternative body merely because something was added to the body; they held, therefore, that there had been no breach of the section because the lorry was being used with the receptacle upon it."

Lord Goddard continued:

> "It is very desirable that with statutes of this nature the same interpretation should be given on either side of the Border. It would be very unfortunate to have, on a similar set of facts, a conviction in England and no conviction in Scotland or vice versa."

4. *Rent legislation.* The Court of Appeal made similar observations in a case arising under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: *Regional Properties Co., Ltd.* v. *Frankenschwerth and Chapman.*[58] A contractual tenant, not prevented by his tenancy agreement from assigning without consent, was given notice to quit. Three days after the notice expired, he assigned the property for the remainder of the term, so that the assignee could hold over as a statutory tenant. The Court of Appeal held that the tenant had, "without the consent of the landlord" (*i.e.*, without the consent "actively given"), assigned. He had therefore brought himself within Schedule 1, paragraph (*d*), and the court had power to make an order for possession under such circumstances (the expression "the tenant" including the contractual tenant), without proof of alternative accommodation, where the court considered it reasonable to do so.

[58] [1951] 1 K.B. 631, 637.

Lord Evershed M.R. declared:

> "I am supported in that opinion by the view taken by the Inner House of the Court of Session in *Dalrymple's Trustees* v. *Brown*.[59] It need not be said that a decision of that court is not binding on this court, but since the Acts to be construed are the same in both Scotland and England, and since cases under those Acts go to the House of Lords from both Scotland and England, it is plainly desirable that the construction of the relevant parts of the Acts should be the same on both sides of the border. I should therefore always be inclined to follow in cases of this kind the decision of the Inner House."

5. *Dogs Act.* In the very recent case of *Smith* v. *Baker*[60] the Divisional Court considered whether a police officer might be a complainant within section 2 of the Dogs Act, 1871. The justices of Ashford, Kent, had ordered that an Alsatian dog, which had attacked and bitten a seven-year-old boy, should be destroyed. It was contended that since proceedings under this section were not criminal proceedings until there was a failure to comply with an order that the dog be kept under proper control or destroyed, only the person "aggrieved" or another person on his behalf, but not a police officer, was a proper person to lay a complaint. Lord Parker C.J. said that the word "complaint" was unqualified as to who the complainant should be, and it was in the public interest that the police should be able to lay a complaint. This view, he added, was in accord with *Walker* v. *Brander*,[61] where it was held that the Procurator-Fiscal had similar power.

There had been a previous decision in 1960 under the same section: *R.* v. *Nottingham Justices, ex p. Brown*.[62] The Divisional Court there held that the section envisaged two stages: first, a civil or administrative proceeding; secondly, a criminal proceeding. On a complaint that a dog was dangerous and not kept under proper control, a court of summary jurisdiction could make a summary

[59] 1945 S.C. 190.
[60] [1961] 1 W.L.R. 38.
[61] 1920 S.C.(J.) 20, 24, *per* Lord Mackenzie: "I think the procurator-fiscal is entitled to present a complaint. Were this not the case the Act would be a dead letter."
[62] [1960] 1 W.L.R. 1315, 1317.

order; secondly, where the order was disobeyed, the person disobeying was liable to a penalty. In the present case, proceedings should have been begun by complaint. Betty Brown was charged by way of information that she was the owner of a dangerous dog not kept under proper control. She pleaded guilty and the justices, adjudging the dog dangerous, ordered her to keep it under proper control. Miss Brown, later, on advice, moved for an order for certiorari to quash the proceedings as a nullity and the court so ordered. No offence was involved until there was a failure to comply with an order when a penalty might be inflicted. In coming to this conclusion Lord Parker C.J. said that the question had come before the courts in Scotland. He cited from the judgment of Lord Clyde, Lord Justice-General, in *Haldane* v. *Allan*,[63] with whose analysis he " entirely agreed."

6. *Adoption.* The desirability for uniformity was mentioned again by Lord Goddard in a decision under the Adoption Act, 1950: *Watson* v. *Nikolaisen*.[64] What is the meaning of the word " abandoned " in section 3 (1) under which the court may dispense with consent if it is satisfied that the parent has " *abandoned* " the infant? A mother hands her child to friends by whom she desires it to be adopted and signs a consent form, believing this to be final and irrevocable and thereby intending to give up her rights in the child. Later, she makes no contribution to maintenance, and withholds her consent to the adoption. Has she " *abandoned* " the child? Far from leaving the child to its fate, she had given it to would-be adopters in whom she had confidence; she had neither parted with her rights in the child nor divested herself of her parental responsibilities. " Abandonment " means such an act as would have rendered her liable to the criminal law.

Lord Goddard followed " a very similar case under the Custody of Children Act, 1891 ": *Mitchell* v. *Wright*.[65] He cited from the opinion of Lord Dunedin that the words " abandoned or deserted " " point at the parent leaving the child to its fate." Here, " she knew and approved of the steps which the respondent took for its

[63] 1956 S.C. 41; 1956 S.L.T. 325, 326.
[64] [1955] 2 Q.B. 286, 295.
[65] (1905) 7 F. 568, 574.

maintenance." So, where the mother entrusted her illegitimate child to a cousin, she did not "abandon" or "desert" it.

7. *Shops Act.* Despite the desire for uniformity, the Divisional Court recently declined to follow certain Scottish decisions under the Shops Act, 1912, and the Shops Act, 1950, preferring the reasoning in the English cases. Yet, before giving a reasoned rejection, the court found it necessary to examine and distinguish the Scots cases.

The decision was *Khan* v. *Newberry*.[66] The question: was a costermonger's barrow, stationary at the time, selling apples at 10.20 p.m. in a London street, a "place not being a shop" where it would be unlawful to keep a shop open for retail trade, contrary to section 12 of the Shops Act, 1950? "No," the Divisional Court answered. The Act contemplated "a degree of permanence." Between a costermonger's barrow, a mobile van equipped as a mobile shop and a movable box-tricycle, there was no distinction.

In *Stone* v. *Boreham*[67] a mobile van was held not to be a "place"; and similarly, a movable box-tricycle, in *Eldorado Ice Cream Co., Ltd.* v. *Keating*.[68]

In *Nixon* v. *Capaldi*,[69] on the other hand, decided under the Shops Act, 1912, but under a similar section, the Court of Justiciary had held that a moveable vehicle was a "place" and that the section was not limited to permanent or quasi-permanent places. The Scots court declined to follow the *Eldorado* case, which was distinguished as dealing with a different, and an English, statute. Similarly, in *Cowlairs Co-operative Society* v. *Glasgow Corporation*,[70] decided under the 1950 Act, the Court of Justiciary applied the same principle to a mobile van from which retail grocery was being sold, during non-permitted hours, on a vacant piece of land.

The Scots cases dealt with weekday trading, the English cases with Sunday trading. Donovan J. could find no material difference in the wording of the respective sections. The "place" was described in similar language: it was "difficult to detect any difference which was crucial."[71]

[66] [1959] 2 Q.B. 1.
[67] [1959] 1 Q.B. 1.
[68] [1938] 1 K.B. 715, 721, *per* Hewart C.J.
[69] 1949 S.C.(J.) 155.
[70] 1957 S.C.(J.) 51.
[71] [1959] 1 Q.B. 1 at 8, 9.

In *Stone* v. *Boreham* Lord Goddard said: "A man carries on business from an address. I do not think these words would apply to a mobile van of this sort." [72] Slade J., but for the *Eldorado* decision, would have followed the Scots case.[73] Devlin J. preferred the English to the Scots reasoning. The Act, he said, is concerned not with the *place of a sale*, but with a place *where retail business is carried on*.[74] The place must be "fixed," not a place where a casual sale happened to be effected. With the argument that a mobile van fitted up as a shop was, in the popular sense of the word, a "shop," he confessed much sympathy but, he said, it had been rejected [75] in the *Cowlairs* case.[76] "It seems to me," he continued, "most desirable whenever possible for the sake of uniformity of decisions under these statutes that we should follow the decisions of the Scottish courts and that excludes that argument."

Unless, continued the Lord Justice-Clerk, Lord Thomson, in *Nixon* v. *Capaldi*,[77] "place" had this broad meaning, the Act could be evaded by "ice cream carts, coal lorries and the elaborate type of vans which go round the countryside carrying goods . . . by selling from booths, or platforms, or trestles and so forth." [78]

Here, perhaps, may be seen the difference in the two ways of thinking: on the one hand, a logical, deductive analysis of the section in the light of the purpose of the statute and the mischief it was designed to prevent; on the other hand, the empirical approach, a reluctance to apply the Act more widely than was necessary to "comparatively humble people," [79] or to strain its meaning "in order to produce a result that is not in accordance with common sense." [80]

It is interesting to note that Lord Goddard said: "Whether, if this case was *res integra* we might come to a different decision I need not inquire," [81] and Slade J. concluded his judgment: "I should again like to emphasise as the present Chief Justice has done

[72] *Ibid.* at 7.
[73] *Ibid.* at 8.
[74] *Ibid.* at 10.
[75] *Ibid.* at 9.
[76] 1957 S.C.(J.) 5.
[77] 1949 J.C. 155, 157.
[78] *Ibid.* at 158. See "Mobile Vans and The Shops Act," 75 *Scottish Law Review* (1959), pp. 127–130.
[79] *Per* Lord Goddard C.J. *arguendo*, in *Stone* v. *Boreham* [1959] 1 Q.B. 1 at 5.
[80] *Per* Devlin J., *ibid.* at 10.
[81] *Ibid.* at 7.

. . . the desirability of allowing within limits an appeal in a criminal cause or matter beyond this court, but at present as the law stands no further appeal lies."

The Administration of Justice Act, 1960, s. 1 (2), now permits both the defendant and the prosecutor to appeal from the Divisional Court to the House of Lords, where the Divisional Court certifies that a point of law of "general public importance" is involved *and* it appears to that court or to the House of Lords that the point ought to be considered by that House. Subject to this, the Divisional Court is bound by its own previous decisions—just as, and subject to the same exceptions as, the Court of Appeal: *Huddersfield Police Authority* v. *Watson*.[82]

8. *Appeals from pensions tribunals.* Denning J. (as he then was) made some valuable observations in *Minister of Pensions* v. *Higham*[83] upon precedents in pension cases. He said:

> "I lay down for myself therefore the rule that, where the Court of Session have felt compelled to depart from a previous decision of this court, that is a strong reason for my reconsidering the matter: and if on reconsideration I am left in doubt of the correctness of my own decision, then I shall be prepared to follow the decision of the Court of Session, at any rate in those cases when it is in favour of the man, because he should be given the benefit of the doubt. In this respect I follow the general rule that where there are conflicting decisions of courts of co-ordinate jurisdiction the later decision is to be preferred, if it is reached after full consideration of the earlier decision. I trust that, by the application of this principle, the few differences that have arisen between the Court of Session and this court will be solved."

In a previous decision, Denning J. had said that "war risk injury"—defined in the War Pension Scheme, 1946, as a physical injury attributable to certain specific causes or to "any other conditions" arising out of war which would be abnormal in time of peace—was to be construed *ejusdem generis* with the cases set out.

[82] [1947] 1 K.B. 841, 847, *per* Lord Goddard C.J.
[83] [1948] 2 K.B. 153, 155.

The Court of Session disagreed and in *Minister of Pensions* v. *Ballantyne*[84] held that the *ejusdem generis* rule did not apply.

(6) *Scots cases and English common law*

Apart from the purpose of uniformity in the interpretation of statutes common to England and Scotland, in a number of questions involving the common law Scots cases have been called in aid in the English courts.

1. *The borrowed servant.* In the *Coggins* case,[85] where the House of Lords, distinguishing *Donovan* v. *Laing*,[86] held that the general employer had a prima facie responsibility for the torts of its servants as against the hirer, Viscount Simon cited with approval and followed a Scots case, *Cairns* v. *Clyde Navigation Trustees*,[87] where, on similar facts, Lord Trayner had held that the trustees, as general employers, were in law liable for the negligent driving of a crane which they had let out with its driver for discharging a ship.

In the *Coggins* case, the Harbour Board had let a mobile crane to stevedores for loading a ship. A craneman was provided—employed, paid and dismissible by it, though the hiring conditions stipulated that the craneman should be the hirer's servant. Lord Macmillan followed *Ainslie* v. *Leith Harbour and Docks Commissioners*,[88] where Lord Trayner had said:

> "I think the defenders never parted with the possession of this crane. They retained possession by the hands of their own servant; they could refuse to work it when they pleased, and the craneman was so completely under their control that if they ordered him to abstain from working he must obey."

[84] Chapman's *War Pensions Appeal Reports* (1948), Vol. 2, p. 641.
[85] *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd. and Another* [1947] A.C. 1, 11.
[86] [1893] 1 Q.B. 629.
[87] (1898) 25 R. 1021, 1024.
[88] 1919 S.C. 67. See also *Mallory* v. *London Midland & Scottish Ry.*, 1944 S.C. 129, 135, for the opinion of Lord Cooper, Lord Justice-Clerk, and for his "broad conclusions," pp. 136–138. On the *ratio* of *respondeat superior*, see the later opinion of Lord President Cooper in *Kilboy* v. *South Eastern Fire Area Joint Committee*, 1952 J.C. 280, 285.

2. *Master's duty of care.* In a previous paper the House of Lords reasoning in *Davie* v. *New Merton Board Mills*[89] has been examined in detail. It was there decided that an employer who buys a tool for the use of his employees from a reputable supplier who, in turn, has bought it from a reputable manufacturer, is not responsible for any injury caused by a latent defect that he could not have discovered. The weight of Scottish opinion over sixty years pointed to the view that the master's duty of reasonable care was not satisfied by obtaining this appliance from a manufacturer or merchant of good repute, but that he had an "absolute responsibility," a "personal duty" to be performed *per se* or *per alios*, to use due care and skill. Suffice it here to mention that Lord Reid found it necessary to re-examine and restate the effect of the Scottish authorities,[90] before the latest Scots authority was reversed.[91]

3. *Proper precautions.* What standard must a master follow and what is the extent of the precautions he must take to provide a safe system of work? Does he need to take greater precautions—*e.g.* towards a garage hand—as by protective goggles, to protect a servant whom he knows has only one good eye, from an increased risk of serious injury if an accident, as from a metal chip, befall him? This was the problem before the House of Lords in *Paris* v. *Stepney Borough Council*[92] when, in holding that such special risk must be borne in mind, they reversed the decision of the Court of Appeal.

A test had been laid down by Lord President Dunedin in *Morton* v. *William Dixon, Ltd.*[93]:

> "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so

[89] [1959] A.C. 604. See G. J. Webber, "Safety of Tools and Employers' Liability," 12 *Current Legal Problems* (1959), pp. 56, 63, 67.
[90] In particular, *Macdonald* v. *Andrew Wyllie & Son* (1898) 1 F. (Court of Session) 339; *Donnelly* v. *Glasgow Corporation*, 1953 S.C. 107 (overruled).
[91] [1959] A.C. 636–641, and see *per* Lord Keith at 652–653.
[92] [1951] A.C. 367.
[93] 1909 S.C. 807, 809, and see *per* Lord Keith at 652–653 of [1959] A.C.

obviously wanted that it would be folly in anyone to neglect to provide it."

In the *Paris* case Lord Normand observed that this criterion

> " does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it." [94]

In the same year, in *Gallagher* v. *Balfour Beatty & Co., Ltd.*,[95] Lord Cooper, Lord President, referring to Lord Normand's speech, said:

> " The law . . . as epitomised in the Dunedin formula, had been adopted in every textbook, and, as was observed in *Carroll* v. *Andrew Barclay & Sons, Ltd.* " (1947 S.C. 411, 418), " it has been used as a proper direction to juries ' in scores of cases,' and also, may I add, as a test of the relevancy of scores of cases of defective system."

Lord Normand's reinterpretation of Lord Dunedin's dictum was adopted by the House of Lords in *Morris* v. *West Hartlepool Steam Navigation Co.*[96]

In a recent appeal from Northern Ireland the House finally reinterpreted Lord Dunedin's words out of existence: *Cavanagh* v. *Ulster Weaving Co., Ltd.*[97] A jury's verdict of negligence in failing to provide a safe system of work had been set aside. The ground was that the defendant's expert evidence that the " set up " was in accord with good practice, had been effectively unchallenged. Thus, there was no evidence of negligence fit to be left to the jury that the omission, in Lord Dunedin's words, was " so obviously wanted that it would be folly in anyone to neglect to provide it."

[94] [1951] A.C. at 382.
[95] 1951 S.C. 712, 716.
[96] [1956] A.C. 552, 571, *per* Lord Reid. See also at 578, 579, *per* Lord Cohen. The test, " subject to a gloss on the word ' folly,' " was applied by Devlin J. in *Graham* v. *Co-op. Wholesale Society, Ltd.* [1957] 1 All E.R. 654, 656, 657.
[97] [1960] A.C. 145.

The House of Lords held that the jury was entitled to find negligence since evidence as to trade practice was not conclusive in the defendants' favour. Lord Somervell of Harrow declared:

> "The fewer the formulas the better will be the administration of this branch of the law in which circumstances in one case can never be precisely similar to those of another." [98]

4. *Liability of hospitals.* Scots law and English law were at one on the non-liability of hospitals for the professional negligence of their medical staff until in *Cassidy* v. *Ministry of Health* [99] the Court of Appeal decided otherwise. Yet already in 1931, Lord Alness, Lord Justice-Clerk, in a dissenting judgment in *Lavelle* v. *Glasgow Royal Infirmary*,[1] took the view that since the nurses were selected, paid and subject to dismissal by the institution, the institution should be liable for their negligence:

> "If a nurse, through negligence, administered a dose of poison to a patient instead of the prescribed medicine, why should not the infirmary equally be liable for the negligence?"

5. *Obscenity—comparison with other books.* Whether a book is "obscene" must be ascertained by examination of the book itself: evidence that other books not materially different from the book alleged to be obscene are in circulation, is irrelevant: *R.* v. *Reiter*.[2]

In the course of the argument the Registrar of the Court of Criminal Appeal handed Lord Goddard C.J. the report of *Galletly* v. *Laird* [3] arising under the Burgh Police (Scotland) Act, 1892. The principles, he said, were the same. Lord Goddard gave two

[98] *Ibid.* at 167 and see *per* Lord Keith at 166. See also *Brown* v. *Rolls Royce, Ltd.* [1960] 1 W.L.R. 210, 213, *per* Lord Cohen; 215, *per* Lord Keith; 216, *per* Lord Denning.

This decision, says Dr. Goodhart in a recent Note in the *Law Quarterly Review*, "has for all practical purposes reduced Lord Dunedin's dictum to an innocuous statement which must not be interpreted in a literal sense. . . ," 76 L.Q.R. (1960), pp. 6, 7. See also "The Dunedin Formula—An Obituary?" 76 *Scottish Law Review* (1960), pp. 57–60.

[99] [1951] 2 K.B. 343; *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K.B. 320.

[1] 1932 S.C. 245, 254–258, at 257. A similar view has since been taken by the Court of Session, in *Macdonald* v. *Glasgow Western Hospitals Board*, 1954 S.C. 453, 471: "I know of no reason why the law of Scotland and the law of England should differ in principle on this matter," *per* Lord President (Lord Cooper). See also at 476, 478, upon the new criterion.

[2] [1954] 2 Q.B. 16, 20.

[3] 1953 S.C.(J.) 16, 27.

substantial citations from the leading judgment delivered by Lord Cooper, Lord Justice-General, the second being on the above issue: "In our opinion it states the law which applies in England as it does in Scotland." In the course of this judgment Lord Cooper had said:

> "The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, this quality in that respect cannot be had any better by examining other books, or listening to the opinions of other people with regard to these other books."

On which Lord Goddard observed:

> "The opinion of the High Court of Justiciary as delivered by the Lord Justice-General in *Galletly* v. *Laird* puts the matter, in my opinion, as well as it can possibly be put, and this court desires to adopt every word of it. It will be understood, I hope, in future that where there are prosecutions, whether under the Obscene Publications Act, 1857, which concerns the sale of indecent literature, or whether for the offence of publishing an obscene libel, that that is the law and that it is to be regarded equally as the law in this country as it is in Scotland." [4]

6. *Damages in tort.* The Judicial Committee of the Privy Council, in very recently overruling *Re Polemis and Furness, Withy & Co., Ltd.*[5]—that if the defendant is guilty of negligence, he is responsible for all the direct consequences of his act whether they were reasonably foreseeable or not—observed that the authority of the decision had been severely shaken. "In Scotland," Viscount Simonds declared, "it has been rejected with determination." [6] He referred to Lord Thankerton's statement in *Glasgow Corporation* v. *Muir* [7] that it had long been held in Scotland that "all that a person

[4] [1954] 2 Q.B. at 20, 21.
[5] [1921] 3 K.B. 560.
[6] *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co., Ltd.* [1961] 2 W.L.R. 126. The House of Lords, it is submitted, is likely to take the same view. See "A. L. G.," "Obituary: *Re Polemis*," 77 L.Q.R. (1961), 175.
[7] [1943] A.C. 448, 454.

can be bound to foresee are the reasonable and probable consequences of the failure to take care judged by the standard of the ordinary reasonable man."

And Lord Macmillan said:

> "In Scotland, at any rate, it has never been a maxim of the law that a man acts at his peril. Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation." [8]

In *Bourhill* v. *Young* [9] the question being whether the motorcyclist owed a duty of care to the pursuer who was beyond the area of potential danger, the Scots rule on the measure of damages in tort could not strictly arise. But Lord Macmillan, at the end of his speech, doubted whether the *Polemis* rule was the law of Scotland: he could cite "ample authority to the contrary."

It is right to state, however, that the most recent and detailed exposition on remoteness of damage in delict [10] would appear to indicate that the Scottish cases use various tests on remoteness of damages in tort and that there is very little authority dealing directly with remoteness of damage. One does not gather that the *Polemis* rule has been rejected in Scotland "with determination," or, indeed, that it has even been decisively "rejected." Lord Macmillan's *obiter* remark is regarded as "the most important" of the contrary views and also an observation by Lord Justice-Clerk Cooper that "this rule of the 'reasonable and probable consequence' is a key that opens several locks, for it not only fixes the nature and measure of the duty to take care, but it may also aid in determining whether the causal nexus is complete or, perhaps, whether the damages claimed are too remote." [11]

Lord Dunedin, on the other hand, had said that damages in tort were damages which

[8] [1943] A.C. at 457.
[9] [1943] A.C. 92, 106. See, however, the argument for the appellant at 95.
[10] David M. Walker, *The Law of Damages in Scotland* (1955) at pp. 23, 518-550, in particular, see 528-531.
[11] *Op. cit.*, at 531, citing *Steel* v. *Glasgow Iron & Steel Co.*, 1944 S.C. 237, 247, 248. Lord Cooper quoted and accepted the formulations in 1943 of Lord Thankerton and Lord Macmillan.

> " will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act." [12]

Professor Walker declares that " so far," the *Polemis* rule on remoteness has " not been expressly accepted in Scotland," but after mentioning a large number of the " determining phrases " used in the cases, " it must, however, be doubted whether the rejection of the *Polemis* rule has been so universal in Scotland as the dicta indicate." [13] And he concludes:

> " Foresight is not mentioned but only reasonableness, directness and naturalness: however it is doubtful if Lord Macmillan's doubt whether directness of consequence ' whether or not it could have been foreseen as a natural and probable result of the negligent act,' is the law of Scotland is justified." [14]

7. Reports of foreign judicial proceedings. In holding that qualified privilege attached to a particular report in an English newspaper of the trial in a Swiss court of a British subject charged with criminal offences in Switzerland, on the grounds that the subject-matter of this particular report was closely connected with the administration of justice in England and was therefore of public interest in England—although he rejected a general qualified privilege for all fair and accurate reports of foreign judicial proceedings in any courts in any country—Pearson J. considered two Scots cases that had been cited to him in *Webb* v. *Times Publishing Co.*,

[12] Cited *ibid.* from *Admiralty Commissioners* v. *S.S. Susquehanna* [1926] A.C. 655, 661. The statement has been adopted in *Hutchinson* v. *Davidson*, 1945 S.C. 395, 404, *per* Lord Russell; *Pomphrey* v. *Cuthbertson*, 1951 S.C. 147, 158, 159, *per* Lord Mackay; *Malcolm* v. *Dickson*, 1951 S.C. 542, 547, *per* Lord Justice-Clerk Thomson, citing Lord Macmillan in the *Bourhill* case. Lord Mackay " more than once following other judges " refused to apply *Polemis* which, he said, " has long been refused acceptance in our Scottish courts at least " (at p. 551). See also at p. 555, *per* Lord Patrick.

[13] *Op. cit.*, pp. 536, 537.

[14] *Op. cit.*, p. 538. And see note 58, above, on Lord Macmillan's doubt. And see T. B. Smith, *The Development of the Laws and Constitutions of Scotland* (British Commonwealth series) (1955), pp. 1098–1101, contrasting Lord Kinloch's statement in *Allan* v. *Barclay* (1864) M. 873 at 874, with *Re Polemis*. Professor Smith says: " . . . dicta in the opinions of the other Scottish judges . . . reject the wider rule as inapplicable to Scotland " (at p. 1099). He favours " a qualified version of the rule in *Re Polemis*."

Ltd.[15] On this point there had been no direct authoritive decision, nor, indeed, any decision of an English court.

The cases were *Riddell* v. *Clydesdale Horse Society*,[16] that a report of judicial proceedings in the United States was privileged, and *Pope* v. *Outram & Co., Ltd.*,[17] upon a report of American divorce proceedings in which the husband was accused of adultery.

In *Riddell's* case a society whose purpose was to help and preserve the purity of a breed of horse proposed to publish among its member a report of a case heard by a commissioner specially authorised by an order of the Circuit Court for Illinois, for the extradition of a party charged with forging false pedigrees to be inserted in their stud book. A Scot sought interdict against the publication of the report and of letters, his property, which had been read in the proceedings. The Scots court held that since the letters and the proceedings had already been published in reports of a public court—a court open to the public and conducted in the public interest—and it was not averred that the report was unfair or inaccurate, interdict could not be granted.

Of this case Pearson J. observed that it was persuasive, though not binding, authority that qualified privilege attached to a fair and accurate report of "some" foreign judicial proceedings. But since there was no argument on the other side, its persuasive weight was diminished. Nor did it contain any discussion of the scope or conditions of such privilege.

In *Pope's* case, again, it was assumed without argument, that qualified privilege would attach to a fair and accurate report of judicial proceedings. And this case was interlocutory, concerned with pleading and settlement of triable issues.

In considering the defendant's contentions, said Pearson J., those Scottish cases were relevant and had to be taken into account, but were not conclusive.[18]

In collecting, from the cases, five reasons assigned for the privilege for reports of judicial proceedings, Pearson J. cited "a

[15] [1960] 2 Q.B. 535, cited by Mr. Gerald Gardiner, Q.C., for the defendants, at 546, 547, who also relied upon Lord Evershed's dictum upon Scots decisions, in *Abbott* v. *Philbin* (*Inspector of Taxes*) [1960] Ch. 27, 49.

[16] 22 S.L.R. 657, 659.

[17] 1909 S.C. 230, 235, *per* Lord McLaren.

[18] [1960] 2 Q.B. at 556.

convenient statement" of the first reason—*viz.*, that court proceedings were open to the public and that, therefore, reports and republication of reports should be freely permitted—from the judgment of the Lord President in a Scottish case, *Richardson* v. *Wilson*.[19] That reason, however, was "not readily transferable to reports of foreign judicial proceedings."[20]

Conclusion

"Let there be no doubt," says Lord Normand, "that as time goes on it will be more and more necessary for the English lawyer to handle Scots cases and for the Scots lawyer to handle English cases. More and more will the legislative output of Parliament create substantial law common to both countries. The influence of the House of Lords will constantly be at work, not always deliberately and consciously, but nevertheless effectively, tending to bring about greater uniformity in large areas of the law, such as contract and tort."[21]

The examples cited, it is respectfully submitted, amply prove Lord Normand's opinion. But lest this be thought to be the pardonable pride of a distinguished Scottish jurist, a passage in the Inaugural Lecture by a great English jurist may be regarded as corroboration. Speaking in 1883 upon "English Opportunities in Historical and Comparative Jurisprudence," Sir Frederick Pollock declared:

> "Cross the border into Scotland and you are under a system of law so different from that of England that at first sight it seems to speak with an unknown tongue. It is a system instructive both in its analogies to ours and in its contrasts, both in the similarity of the results produced and in the diversity of the means by which they are effected. English lawyers, as a rule, are content to live in greater ignorance, if possible, of the laws of Scotland than of the laws of the Continent of Europe. Here are opportunities of fruitful comparison—and I mean fruitful

[19] (1879) 7 R. 237, 241.
[20] [1960] 2 Q.B. at 560.
[21] At p. 4 of his Presidential Address, as Lord President of the Court of Session, to the Holdsworth Club, on *Scottish Judicature and Legal Procedure* (1940–41).

for practical as well as philosophical purposes—going to waste at our own door." [22]

This lecture was delivered long before the legislative output common to both countries had reached its modern size and before English judges had begun to lay stress upon the need for uniformity of approach. And yet, broadly speaking, both the criticism and the exhortation still remain true.

The examples from recent English decisions discussed in this paper do seem to indicate that collaboration and comparison by lawyers on both sides of the border would be " fruitful for practical as well as philosophical purposes." *

[22] *Oxford Lectures and Other Discourses* (1890), Vol. 2, pp. 37–64, at p. 50.

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THE ABS-SHAWCROSS DRAFT CONVENTION ON INVESTMENTS ABROAD

A Critical Commentary

GEORG SCHWARZENBERGER

CAPITAL export since 1945 has primarily taken the forms of foreign aid and government loans. International institutions have also played a minor, but significant role.[1] But a large demand on the part of less developed countries for more capital remains unsatisfied.[2] If the Western world desires to meet this demand, at least in part, a considerable portion of the capital required must come from private sources. Yet, understandably, the private investor is somewhat hesitant to see history repeat itself at his expense.[3]

A growing number of countries interested in capital import have tried to tempt potential investors by means of reassuring national legislation.[4] Capital-exporting countries, also, have sought to encourage private investors by foreign investment guarantees, insurance schemes and tax concessions.[5] In addition, the United States of America [6] and, to a minor extent, the United Kingdom [7]

[1] *Cf.* J. Salmon, *Le Rôle des Organisations Internationales en matière de Prêts et d'Emprunts* (1958), and K. Katzarov, *Théorie de la Nationalisation* (1960), p. 485 *et seq.*

[2] *Cf.* P. G. Hoffman, "Operation Breakthrough," 38 *Foreign Affairs* (1959), p. 31 *et seq.*; Parliamentary Group for World Government, *A World Investment Convention?* (1959), p. 22 *et seq.*, and R. N. Gardner, "International Measures for the Promotion and Protection of Foreign Investment," 9 *J. of Public Law* (1960), p. 176 *et seq.*

[3] *Cf.* United Nations, *The Effects of Taxation on Foreign Trade and Investment* (1950); S. Friedman, *Expropriation in International Law* (1953), p. 5 *et seq.*; S. R. Rubin, *Private Foreign Investment* (1956); M. Brandon, "Legal Deterrents and Incentives to Private Foreign Investments," 43 *Grotius Society Transactions* (1957), p. 39 *et seq.*, and the writer's "The Protection of British Property Abroad," 5 *Current Legal Problems* (1952), p. 295 *et seq.*

[4] *Cf.* United Nations, *Foreign Investment Laws and Regulations* (1951); H. W. Baade, *Gesetzgebung zur Förderung ausländischer Kapitalanlagen* (1957), and W. G. Friedmann and R. C. Pugh (editors), *Legal Aspects of Foreign Investment* (1959).

[5] *Cf.* United Nations, *The International Flow of Private Capital 1956–1958* (1959), p. 100 *et seq.*

[6] Since 1945, the United States has implemented an impressive commercial treaty programme on a pattern, the most recent illustration of which is the Treaty of

[7] See note on p. 214.

have succeeded in reformulating in various types of bilateral treaties the rules of international customary law on the protection of foreign property. Even so, a considerable measure of doubt remains. The pertinent Resolutions adopted in 1952 and 1954 by the General Assembly of the United Nations [8] have done little to alleviate this uncertainty. Thus, there is still plenty of scope for realistic and constructive thinking.

In Western Europe, the interests primarily concerned with capital export—banking and oil—and their legal advisers have increasingly tended to favour concerted action on the basis of an international investment code, embodied in a multilateral convention.[9] A number of earlier efforts have now coalesced into a draft *Convention on Investments Abroad*, the work of a committee under the direction of Dr. Abs, Director-General of the *Deutsche Bank*, and Lord Shawcross.[10] It deserves critical examination on its own merits. Beyond this, the draft has now become an official document. On German initiative, it is under active consideration by the Organisation for European Economic Co-operation, soon to be transformed into the Organisation for Economic Co-operation and Development, as one of the *travaux préparatoires* for an officially sponsored Draft Convention on the Protection of Foreign Property. As the text of the Abs-Shawcross Draft Convention is not easily accessible, it is probably fairest to provide this critique in the form

Friendship and Commerce of November 12, 1959, with Pakistan. *Cf.* also Department of State, *Commercial Treaty Program of the United States* (1958); R. R. Wilson, *United States Commercial Treaties and International Law* (1960), p. 94 *et seq.*, and M. Domke, "American Protection against Foreign Expropriation," 105 *Univ. of Pennsylvania L.R.* (1957), p. 1033 *et seq.*

[7] *Cf.*, for instance, the Treaty of Commerce, Establishment and Navigation of March 11, 1959, between the United Kingdom and Iran, Cmnd. 698 (1959).

[8] Resolutions 622c and 626 (VII), December 21, 1952, and 824 (IX), December 11, 1954. *Cf.* also J. N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources," 50 A.J.I.L. (1956), p. 854 *et seq.*, and M. Brandon, "Legal Aspects of Private Foreign Investments," 18 *Fed.Bar J.* (1958), pp. 311–312.

[9] On the earlier drafts, *cf.* M. Brandon, "Recent Measures to Improve the International Investment Climate," 9 *J. of Public Law* (1960), p. 125 *et seq.*; A. S. Miller, "Protection of Private Foreign Investment by Multilateral Convention," 53 A.J.I.L. (1959), p. 371 *et seq.*, and S. D. Metzger, "Multilateral Conventions for the Protection of Private Foreign Investment," 9 *J. of Public Law* (1960), p. 133 *et seq.*

[10] The *Draft Convention* (subsequently so abbreviated) is dated April 1959. References are to the text printed for private circulation.

of a commentary on the Articles which, where necessary, have been regrouped.[11]

I. Objects and Assumptions

The Preamble runs as follows:

> " The High Contracting Parties:
>
> believing that peace, security and progress in the world can only be attained and ensured by fruitful co-operation between all peoples on a basis of international law and mutual confidence;
> appreciating also the importance of encouraging commercial relations and promoting the flow of capital for economic activity and development;
> and considering the contribution which may be made towards these ends by a restatement of principles of conduct relating to foreign investments;
> have resolved for this purpose to conclude the present Convention."

There is something to be said for reformulating the first two paragraphs of the Preamble in less circuitous language so as to bring the salient points into the open.

The banking interests concerned are ready to export surplus capital to countries which can offer investors more attractive yields than can be obtained at home or in any of the other industrialised countries. Most of the oil interests involved are even more inescapably linked with the marginal countries which are the source of a considerable, if not the greater, part of their revenues. Thus, both groups try to improve by way of a multilateral convention what, in the light of Anglo-Dutch and American experiences in the past, is somewhat precarious: legal protection against default on their obligations by debtor States and grantors of concessions.

The developing countries, in their turn, have reasons of their own to welcome such co-operation. They may have attained " sovereign equality " in the meaning of the Charter of the United

[11] The writer is greatly obliged to Lord Shawcross for his readily granted permission to publish the text of the *Draft Convention* in this paper and his comments on a preliminary version of this *Critical Commentary*, published in 9 *J. of Public Law* (1960), p. 147 *et seq.* *Cf.* also Lord Shawcross, *The Protection of Foreign Private Investments* in *Trade and Industry* (Karachi), December 1960, p. 1 *et seq.*

Nations. Yet, in a divided and strongly hierarchical international society, cogent reasons readily come to mind why, compared with financial assistance in any other shape, private foreign investors may well be the lesser evil.

Thus, at least potentially, a considerable measure of common ground exists: willingness to invest and willingness to accept such foreign investments.[12] The rest is a matter of attitudes. Both sides have reasons to be suspicious of each other. Capital-importing countries are afraid of private foreign investment amounting to little more than a continuation of economic imperialism and colonialism by new, and subtler, means. Capital-exporting countries may harbour doubts of their own on the trustworthiness of promises profusely made before receipt of the golden eggs.

Clearly, the overriding object of this *Draft Convention* is to drive home that it is not conceived in the antagonistic spirit of past ages, but that the interests involved are viewed as complementary and are adjusted on a footing of substantive reciprocity and good neighbourliness. Admittedly, some of these ideas find expression in subsequent Articles.[13] Yet, if the Preamble were redrafted on such more concrete and, perhaps, more realistic lines, it might gain in usefulness as a guide to the intentions of the parties regarding the objects of the Convention.

In the third paragraph of the Preamble, the claim is advanced that the *Draft Convention* contains a "restatement of principles of conduct relating to foreign investments." It is not entirely clear from this text whether these principles of conduct are supposed to be restatements of principles of business practice, ethical imperatives or rules of international law. As emerges only from the Commentary attached to the *Draft Convention*,[14] the Articles of the *Draft Convention* are intended to give expression to "the fundamental principles of international law regarding the treatment of the property, rights and interests of aliens."

If this is so, it should be stated unequivocally in the text. If not,

[12] On this assumption, see further Miller, *loc. cit.*, in note 9, above, pp. 375–376. *Cf.* also A. Larson, "Recipients' Rights under an International Investment Code," 9 *J. of Public Law* (1960), p. 172 *et seq.*

[13] See under II, below.

[14] *Draft Convention*, p. 9.

it would perhaps be advisable to avoid the impression of evasiveness on so important a matter. Be this as it may, it will be the primary object of this paper to explore the extent to which the claim is acceptable that this *Draft Convention* is essentially a restatement of *lex lata* in the form of a multilateral convention.

II. The Scope and Standards of Protection

In Article I, the scope and standards of protection granted to foreign property are formulated as follows:

> "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures."

This Article calls for a number of comments.

(a) *The beneficiaries*

The personal scope of protection is determined by the test of nationality. In paragraph (*a*) of Article IX, nationals are defined as including in relation to a Party to the Convention

> "(i) companies which under the municipal law of that Party are considered national companies of that Party and (ii) companies in which nationals of that Party have directly or indirectly a controlling interest. 'Companies' includes both juridical persons recognised as such by the law of a Party and associations even if they do not possess legal personality."

A minor point of drafting may be mentioned *en passant*. It would probably be an improvement to speak of "nationals" rather than "national companies."

If the object is to attain the maximum of protection for nationals abroad, the net has to be widely cast. Three points, however, appear to require discussion. First, does the formulation chosen keep within the limits of existing international law? Second, how far does this diminish the risk that a national remains unprotected

on the ground of dual or multiple nationality? Third, is this formulation wide enough *de lege ferenda* to cover all cases worthy of protection?

(1) *The declaratory character of Article IX (a).* At least since the *Nottebohm* judgment of the International Court of Justice,[15] it is questionable whether, for purposes of diplomatic protection, a claimant State is wise in taking it for granted that it is still automatically entitled to protect every national who, under its own municipal law, is regarded as possessing its nationality.

(2) *Problems arising from dual nationality.* Assuming that the difficulties arising from the *Nottebohm* case could be ignored, there would still be the problems arising from dual and multiple nationality. If the claimant State is to be entitled to determine exclusively who are its nationals, so is the defendant State. It may be hoped that whenever the question should arise before a tribunal established under Article VII of the *Draft Convention*, the tribunal would settle such a preliminary issue regarding its jurisdiction by reference to the test of overriding nationality. It would, however, hardly be safe as yet to rely on this.[16]

The uncertainties inherent in the control test if formulated as vaguely as has been done in Article IX (*a*) (ii) are apparent. Moreover, so long as a company is a going concern,[17] a defendant State is hardly bound under international customary law to consider a company registered in its own territory as a national of a claimant State simply because nationals of the latter State have "directly or indirectly a controlling interest" in the company.

In British and United States practice, intervention is limited in such cases to interposition on behalf of the individual beneficial owners who are British, or United States, nationals, as distinct from the company itself. Moreover, such intercession is limited to cases

[15] *I.C.J. Reports, 1955*, p. 4. See further the writer's *International Law*, Vol. I (3rd ed., 1957), pp. 132, 140–141 and 354 *et seq.*, and the literature cited *ibid.*, p. 753 *et seq.*

[16] For the balance of opinion in international judicial practice, *cf. ibid.* (1957), p. 362 *et seq.*

[17] *Cf. ibid.* p. 387 *et seq.*

in which substantial injustice would otherwise be done to the interests of nationals.[18]

In any case, the potential extension of nationality for purposes of international protection to associations lacking legal personality constitutes an innovation.[19]

(3) *Critique de lege ferenda.* If the maximum of protection for investors is to be attained, two further points call for consideration.

In international judicial practice, the minimum period during which nationality must be continuous to entitle a State to commence or continue diplomatic intervention is still very unsettled. Even if, as is suggested in the *Draft Convention*, nationals of Parties to the Convention were entitled to institute arbitral proceedings on their own, problems of *dies a quo* and *dies ad quem* would arise. Would an individual who became a national of a Party to the Convention subsequent to the act complained of be entitled to the protection of the Convention, and what would be the position of heirs who are not nationals of a Contracting Party?[20]

It may also be worth considering whether, in a subsidiary way, domicile in the territory of a Party should be made a connecting link between a claimant State and an individual. This would enable a Contracting Party with which a stateless person or refugee is connected more closely than with any other Party to espouse his claim.[21]

(b) *Property*

This is defined in paragraph (*b*) of Article IX as including "all property, rights and interests, whether held directly or indirectly.

18 *Cf.* Sir Eric Beckett, "Diplomatic Claims in respect of Injuries to Companies," 17 *Grotius Society Transactions* (1931), p. 175 *et seq.*; J. Mervyn Jones, "Claims on behalf of Nationals, etc.," 26 B.Y.I.L. (1949), p. 225 *et seq.*; Hackworth, 2 *Digest of International Law*, pp. 500 and 567; 3 *ibid.* p. 420 *et seq.*, and 5 *ibid.* p. 832 *et seq.*, and H. J. Clay, "Recent Developments in the Protection of American Shareholders' Interests," 45 *Georgetown L.J.* (1956), p. 1 *et seq.*

19 *Cf.*, for instance, the decisions of the British-German Mixed Arbitral Tribunal in *Hyman* v. *Wydra* (1921) 1 M.A.T. p. 291 at pp. 293–294, and of the Franco-German M.A.T. in *Mercier et Cie* v. *Germany* (1923) 3 M.A.T. p. 686 at pp. 688–689.

20 See further *loc. cit.* in note 15, above (1957), p. 596 *et seq.*

21 *Cf.* P. C. Jessup, *A Modern Law of Nations* (1948), p. 70.

A member of a company shall be deemed to have an interest in the property of the company."

This wide formulation in the Convention of property rights as including proprietary interests is in conformity with international law as applied on the international judicial level.[22] Yet, whether, under international customary law, the interests of the members of a company in a company's property can be equated so generally as is done in this clause with those of the members of the company may well be doubted.[23]

(c) *The standard of equitable treatment*

In order to assess the appropriateness of the standard selected in the *Draft Convention*, it is advisable shortly to recall the seven optional standards which, in addition to the minimum standard applicable to foreigners under international customary law, are at the disposal of Contracting Parties: the standards of identical, national, most-favoured-nation, equitable and preferential treatment as well as the more recent additions of the standards of the open door and good neighbourliness.[24]

Article I presents an imaginative attempt to combine the minimum standard with the standard of equitable treatment. This decision is well justified on two grounds. The experiences of the last forty years suggest that whenever, in fact, an agreed settlement has been reached, the creditors have consented to temper the application of the minimum standard by the introduction of an equitable element in the form of considerable concessions on their part.[25] Thus, it appears wise to anticipate—and limit—such contingencies. Moreover, in relations between heterogeneous communities—in

[22] *Cf.* I. Seidl-Hohenveldern, *Internationales Konfiskations-Enteignungsrecht* (1952), pp. 34–35; I. Foighel, *Nationalisation* (1957), p. 102 *et seq.*; R. L. Bindschedler, "La protection de la propriété privée en droit international public," 96 *Recueil de l'Académie de la Haye* (1956), p. 217 *et seq.*; B. A. Wortley, *Expropriation in Public International Law* (1959), p. 8 *et seq.*, and *loc. cit.* in note 15, above (1957), p. 200.

[23] See further *loc. cit.* in note 15, above (1957), p. 200 *et seq.*, and note 18, above.

[24] See further the writer's "Province and Standards of International Economic Law," 2 I.L.Q. (1948), p. 406 *et seq.*, and *loc. cit.* in note 15, above (1957), p. 229 *et seq.*

[25] See, for instance, Wortley, *loc. cit.* in note 22, above, p. 58 *et seq.*, and the present writer, *loc. cit.* in note 3, above (1952), p. 295 *et seq.*

varying stages of technological advancement, social structure and political organisation—and in an age of rapid change, the standard of equitable treatment provides equality on a footing of commendable elasticity. Inevitably, it suffers from the drawbacks of its virtues: a corresponding measure of vagueness and subjectivity.

In this way, the beneficiaries of this *Draft Convention* would obtain three tangible advantages: first, the benefits of the minimum standard, embodied in the *Draft Convention* in the form of a positive obligation to ensure the "most constant protection and security" for property covered by the Convention; second, treatment in accordance with the requirements of *jus aequum*: fairness and reasonableness[26]—for it would be difficult to imagine a differentiation on the footing of either foreign or inland parity which would not be discriminatory, unfair or unreasonable; and, third, substantially the equality of treatment they would obtain from the cumulative application of the most-favoured-nation and national standards.[27]

The emphasis in Article I of the *Draft Convention* on protection and security of foreign property being "most constant" and being granted "at all times" does not appear to add any undue rigidity to the obligations expected to be undertaken by capital-importing States. What is promised at all times is merely the grant of equitable treatment.

Moreover, in Article V, a number of circumstances are enumerated which explicitly exonerate Contracting Parties:

> "No Party may take measures derogating from the present Convention unless it is involved in war, hostilities or other public emergency which threatens its life; and such measures shall be limited in extent and duration to those strictly required by the exigencies of the situation. Nothing in this Article shall be construed as superseding the generally accepted laws of war."

In its objects, this Article is sensible enough. It may, however, be questioned whether the formulation chosen allows for more

[26] See further *loc. cit.* in note 15, above (1957), p. 53, and in Index *sub nomine*: *Jus Aequum*.

[27] *Cf.* the writer's "The Most-Favoured-Nation Standard in British State Practice," 22 B.Y.I.L. (1945), p. 118 *et seq.*

novel forms of intermediate situations between states of peace and war to be taken adequately into account. If the Arab States and Israel were to become Parties to the Convention, would the state of war still existing between them entitle them to take against the property of one another's nationals discriminatory measures which they consider " strictly required by the exigencies of the situation "?

Similarly, if the Security Council decided to apply economic sanctions under Chapter VII of the Charter of the United Nations —or if, under the Uniting for Peace Resolution of 1950, the General Assembly recommended member States to take such steps—would action of this kind be covered by Article V? If not, at least in the case of action under Chapter VII of the Charter, the position would be clear in the *inter se* relations between member States of the United Nations; for the members of the United Nations are bound to comply with decisions of the Security Council, and their duties under the Charter take priority over other incompatible commitments.[28] Yet, in spite of the claims made in Article 2 (6) of the Charter of the United Nations, non-member States are not under any corresponding obligation. Moreover, whenever member States should decide to apply economic sanctions in voluntary compliance with a resolution of the General Assembly, it could hardly be argued that member States were fulfilling any legal duty incumbent on them under the Charter.

Thus, from the point of view of drafting, Article V in its present formulation does not yet appear to be the last word. Similarly, Article I would perhaps benefit from further care being bestowed on its wording. " Ensure " is probably an overstatement of legal duties in situations which do not appear to call for more than a *grant* of the treatment set out in the Article. If, however, the object in using the word " ensure " is to cover also action by State-owned or State-controlled agencies, it would perhaps be advisable to say so in so many words. " Fair and equitable " appears to suffer from a proclivity to redundancy. The juxtaposition of " fair and reasonable " would probably bring out more clearly the essence of *jus aequum*.

[28] Arts. 25 and 103 of the UN Charter.

Finally, the most important issue in relation to the application of so subjective a standard as that of equitable treatment must at least be raised at this stage.[29] Who is to decide whether a Contracting Party has complied with its obligations under the Convention?

III. The Observance of Undertakings

In accordance with Article II,

> "Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party."

This Article covers undertakings by Contracting Parties both to subjects and objects of international law. In so far as relations between subjects are concerned, the Article does not add anything to the binding character of such undertakings. Even if unilateral in form, they are as binding as any other consensual undertakings.[30] Nevertheless, even in these relations, the incorporation of such a promise has its value. If a breach of such an undertaking is alleged, and this is not covered by Article V of the *Draft Convention*,[31] any such act or omission may amount to a breach of the Convention and, thus, constitute an arbitrable dispute under the Convention.[32]

The main significance of the Article lies, however, in a different direction. In effect, obligations towards objects of international law, which as such are beyond the pale of international law, are transformed by this Article into obligations under international law. For this purpose, it does not matter whether public contracts are treated as falling under any particular system of municipal law, under legal rules abstracted from a number of such legal systems, or are allocated to a separate legal system of quasi-international law.[33] Whichever of these solutions is preferred, it is clear that

29 See below, text to note 41 and under VI.
30 *Cf. loc. cit.* in note 15, above (1957), p. 548 *et seq.*
31 See under II, above.
32 See under VI, below.
33 *Cf.* F. A. Mann, "The Law Governing State Contracts," 21 B.Y.I.L. (1944), p. 11 *et seq.*, and "Die Verträge der Völkerrechtssubjekte und die Parteiautonomie," in *Gutzwiller Festgabe* (1959), p. 477 *et seq.*; Lord McNair, "The General Principles of Law Recognised by Civilised Nations," 33 B.Y.I.L. (1957),

these relations are not *per se* governed by international law. By Article II, any undertaking relating to investments, and given by a Party to nationals of any other Party, would be paralleled by corresponding obligations between the Parties.

Under international customary law, any breach of an undertaking between a sovereign State and a foreign national becomes the concern of the latter's home government, only if it can show the requisite legal interest. This presupposes either a denial or delay of justice, or one of the exceptional situations in which there is no chance of any justice being administered and, therefore, the denial of justice is apparent without any need for the national injured to go through the motions of procedures below the minimum standard of international law.[34] In other words, a State must normally first be given the opportunity to remedy itself the alleged breach of any relevant standard imposed by international law.

Article II is so worded as to make it unnecessary for a national first to seek justice on the levels of the municipal law of a capital-importing State (or a State granting a concession) or the law specifically provided for under a particular public contract. Whenever one of the Contracting Parties should claim that another Contracting Party had failed to ensure the observance of an undertaking "given in relation to investments made" by one of its nationals, that other Contracting Party would allegedly be in breach of the Convention.

This is a far-reaching departure from the law as it stands and may tilt the balance too far in favour of the investor. Where non-international procedures and remedies for alleged breaches of non-international obligations exist, they should first be fully exhausted.

p. 1 *et seq.*; K. S. Carlston, "Concession Agreements and Nationalisation," 52 A.J.I.L. (1958), p. 260 *et seq.*; S. M. Schwebel, "International Protection of Contractual Arrangements," 53 *Proceedings Am.Soc.I.L.* (1959), p. 266 *et seq.*; A. Verdross, "The Status of Foreign Private Interests," 9 *Österr. Zeitschrift für öffentliches Recht* (1959), p. 449 *et seq.*; H. G. Calvert, "The Law Applicable to Concessions," 1 *University of Malaya L.R.* (1959), p. 265 *et seq.*; G. W. Ray, *Law Governing Contracts between States and Foreign Nationals* (1960); the present writer's *Die Kreuger—Anleihen* (1931), *loc. cit.* in note 3, above (1952), p. 312 *et seq.*, and *loc. cit.* in note 15, above (1957), pp. 146 *et seq.* and 578–579.

[34] See further *loc. cit.* in note 15, above (1957), p. 602 *et seq.*

IV. The Limits of Lawful Expropriation

In Article III of the *Draft Convention*, the line between lawful expropriation and illegal confiscation is drawn as follows:

> "No Party shall take any measures against nationals of another Party to deprive them directly or indirectly of their property except under due process of law and provided that such measures are not discriminatory or contrary to undertakings given by that Party and are accompanied by the payment of just and effective compensation. Adequate provision shall have been made at or prior to the time of deprivation for the prompt determination and payment of such compensation, which shall represent the genuine value of the property affected, be made in transferable form and be paid without undue delay."

Existence of an adequate public interest and full compensation are two generally accepted conditions on which, under international customary law, the legality of expropriation of private foreign property depends.[35] The treatment which these and other requirements stipulated in Article III of the *Draft Convention* have received calls for discussion.

(a) *Public interest*

The omission of this constitutive element of lawful expropriation from Article III is surprising. According to the Commentary attached, this Article is meant to follow closely a provision uniform in recent United States treaties of friendship and commerce.[36] Yet, even in those treaties in which these words have been omitted, the "public interest" clause is implied in phrases such as the "full protection and security required by international law." In a number of these treaties it has, however, been considered advisable expressly to

[35] *Cf.* the literature mentioned in notes 3 and 22, above. See also B. Cheng, *General Principles of Law* (1953), p. 37 *et seq.*, *loc. cit.* in note 15, above (1957), pp. 200 *et seq.* and 580–581, and the Resolution on *Nationalisation*, adopted at the New York Conference of the International Law Association, 1958 (*Report of the 48th I.L.A. Conference* (1960), p. 161).

[36] *Loc. cit.* in note 10, above, p. 11. *Cf.* also Wilson, *loc. cit.* in note 6, above, pp. 120–121.

stipulate that the property of nationals and companies of either Party shall not be taken within the territories of the other Party "*except for a public purpose*." [37]

It is arguable that it is wiser not to press compliance with so subjective a factor, the absence of which is normally hard to prove. However, both State practice and international judicial practice know of cases in which the complete absence of a public interest in purported acts of expropriation has been clearly established. In such extreme cases, it is most convenient to be relieved of the necessity to consider any other grounds which may give the action taken its confiscatory character.[38] It is also a tenable proposition that the element of public interest can perhaps be inferred from other terms employed in Article III. Yet, why infer what, without apparent difficulty, can be stated unequivocally in a few words? [39]

(b) *Protection against indirect deprivation of property*

It is difficult to determine where indirect deprivation of property ends and, for instance, taxation, planning legislation or property law reform begins. While it is impossible to lay down any hard and fast rule on the dividing line, it is all to the good that, in Article III, an attempt is made to cover surreptitious forms of confiscation. Whenever this is the real object, the label of the ostensible action taken is of little consequence.[40] Yet, whether an act of State belongs to one or the other category and, thus, constitutes an illegal interference with property rather than an unchallengeable exercise of State power largely depends on the purpose of the measure. Thus, again, the evaluation of objects and

[37] Art. VI (4) of the Pakistan-United States Treaty of Friendship and Commerce of November 12, 1959. *Cf.* also the F.C.N. Treaties with Greece (Art. VII (3)—August 3, 1951, TiAS 3057) and Israel (Art. VI (3)—August 23, 1951, TiAS 2948) and note 6, above.

[38] For illustrations, *cf.* Lord McNair, "The Seizure of Property and Enterprises in Indonesia," 6 *Netherlands I.L.R.* (1959), pp. 222–223, and the writer's "Uses and Abuses of the 'Abuse of Rights,'" 42 *Grotius Society Transactions* (1956), pp. 154–155.

[39] For due emphasis on this point, see, for instance, the literature cited in note 35, above, Lord McNair, *loc. cit.* in note 38, above, p. 243 *et seq.*, and A. Verdross, *ibid.* p. 285.

[40] *Cf.*, for instance, Bindschedler, *loc. cit.* in note 22, above, p. 212, and the literature cited in note 38, above.

motives cannot be avoided. Moreover, any judgment on matters of this kind is itself greatly influenced by non-legal considerations. Under the *Draft Convention*, the last word would be with the umpire of the arbitral tribunal.[41]

(c) *Due process of law*

On the face of it, this term is capable of a number of interpretations. It may mean compliance with such legal procedures as the law of the land—*lex terrae* of Magna Carta—provides. The clause would then offer protection against arbitrary action on the part of an executive which was even in disregard of the national law of the contracting party concerned. The "due process" clause may also be intended to suggest complete immunity from any interference unless certain minimum requirements of judicial review are met. This would be in accordance with a widespread Continental liberal, and nineteenth-century, view of the legality of expropriation.[42] Beyond this, any "due process" clause evokes memories of the naturalist interpretations accorded to the Fifth and Fourteenth Amendments by the United States Supreme Court.

It is a generally accepted rule of treaty interpretation that terms must not be given a meaning attached to them by only one or some of the Contracting Parties.[43] Nevertheless, it would be arguable that, in this context, the *travaux préparatoires* lead to a different conclusion. The "due process" clause has been used in a number of United States treaties of commerce and navigation since 1919 and, it may be shown, found its way from there into the *Draft Convention*. On this, admittedly dubious, foundation extravagant claims could easily be built. If, by any chance, the umpire of an arbitral tribunal under the Convention were swayed by this argument, a minority view of this issue, however sensible, might well be overruled. Considering the extent to which, in United States constitutional practice, the "due process" clause has been used as

[41] See under VI, below.

[42] See further Wilson, *loc. cit.* in note 6, above, p. 114 *et seq.*, and *loc. cit.* in note 3, above (1952), pp. 298–299.

[43] See further *loc. cit.* in note 15, above (1957), p. 70. *Cf.* also R. R. Wilson, *The International Law Standard in Treaties of the United States* (1953), pp. 51–52 and 101.

a vehicle for the incorporation in *lex lata* of natural law claims on "inalienable" property rights,[44] such apprehensions cannot be easily dismissed.

If this is what the sponsors of the *Draft Convention* have in mind, they ought to say so. If not, they should guard themselves against the suspicion, however unjustified, of keeping a "secret weapon" in reserve. All that is needed is a definition of "due process" and its addition to the other definitions already assembled in Article IX.

(d) *Absence of discrimination*

The prohibition of discriminatory measures is formulated in somewhat sweeping terms. Inevitably, therefore, a number of questions arise.

What is meant by discrimination in the *Draft Convention*? Does it cover any kind of unequal treatment or is it limited to arbitrary differentiation? Does every privileged treatment of some constitute discrimination against others? What is the *tertium comparationis*—nationals of the States taking the measures in question, the nationals of other Contracting Parties, foreigners at large, or all these categories together?

It is widely accepted that, at least in the field of expropriation, non-discrimination is an absolute condition of lawful expropriation.[45] On closer examination, however, the picture becomes more complicated. Extracts from State practice and judicial pronouncements which are based on treaties and others in which reliance is placed on international customary law are not always kept sufficiently apart. Moore's careful distinction between just and unjust forms of discrimination is not always remembered.[46] Evidence of rules prohibiting discrimination between foreigners and nationals in the application of municipal law and between foreigners according

[44] *Cf.*, for instance, C. G. Haynes, *The Revival of Natural Law Concepts* (1930), p. 104 *et seq.*, and W. B. Cowles, *Treaties and Constitutional Law, Property Interferences and Due Process of Law* (1941).

[45] See, for instance, the Opinions by Lord McNair, Rolin and Verdross, *loc. cit.* in note 38, above, pp. 243, 247, 269 and 284.

[46] *Digest of International Law*, Vol. VI (1906), p. 698 *et seq.*

to criteria such as race or religion tends to be treated as proof of the illegality of *all* forms of discrimination.[47]

In practice, the requirements of the minimum standard of international law in favour of foreigners and their property are stricter than those of the municipal laws of more backward States.[48] Thus, as a rule of thumb, it is correct to consider as illegal any discrimination between nationals and foreigners to the latter's disadvantage. Yet, what really matters is not whether the treatment of foreigners is better or worse than that accorded to a State's own nationals or is equal to their treatment, but whether it measures up to the minimum standard of international law.

A relevant dictum which deserves to be recalled will be found in the award of the British-United States Arbitral Tribunal (under the Special Agreement of August 18, 1910) in the *Eastern Extension, Australasia and China Telegraph Company* case (1923). In this case, which was concerned with the property claims of neutral nationals, it was held that "it is perfectly legitimate for a government, in the absence of any special agreement to the contrary, to afford to subjects of any particular government treatment which is refused to the subjects of other governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination."[49] This dictum appears to be too wide and does not sufficiently allow for situations in which discrimination between foreigners and nationals may well be the first indication of a breach of the minimum standard. Yet, even with these reservations, awareness of this award probably assists in arriving at a more balanced view of the matter.

If the duty of non-discrimination under Article III of the *Draft Convention* were absolute, the present formulation of the Article would lead to a remarkable extension of the immunity of foreign

[47] For a balanced treatment, see D. Schindler, *Gleichberechtigung von Individuen als Problem des Völkerrechts* (1957). On the need for further research on this and related issues, *cf.* 87 *Recueil de l'Académie de la Haye* (1955), pp. 315–316. See also *loc. cit.* in note 3, above (1952), p. 311.

[48] See further *loc. cit.* in note 15, above (1957), p. 200 *et seq.*

[49] 6 R.I.A.A., p. 112 at p. 117.

private property. A further exception clause in this Article excludes from lawful interference measures contrary to undertakings given by a Contracting Party. Thus, if a Contracting Party granted to one oil company permanent or temporary immunity from expropriation, not only all other oil companies which are nationals of the same Contracting Party, but also those of the nationality of all other Contracting Parties, might consider themselves entitled to the same privileged treatment, and they might well claim that to treat them otherwise would constitute a discriminatory measure. Similarly, if the prohibition of discrimination were absolute, any reprisals against the property of nationals of Contracting Parties—another aspect of the matter which appears to call for further consideration—would also be excluded.[50]

It is possible that such an extreme view of the matter accurately reflects the intentions of the sponsors of the *Draft Convention*. It is equally possible that they are all sweet reasonableness and, by discriminatory measures, understand merely arbitrary or unreasonable differentiation. The matter is, however, sufficiently obscure to call for unequivocal clarification in an interpretative definition of discriminatory measures.

(e) *The sanctity of undertakings*

If nationals of Contracting Parties have received undertakings exempting their property from any particular kind of interference, expropriation, however unobjectionable it may be otherwise, is precluded by the *Draft Convention*.

As has been fully explained elsewhere,[51] wherever the breach of an undertaking given to a foreign national involves an act of bad

[50] While, in this context, the celebrated Report of the British Law Officers of January 18, 1753 (B.F.S.P., Vol. 20, p. 889 *et seq.*), is relevant, its authors did not maintain that under international customary law private property of foreigners was immune from reprisals in all circumstances.

Cf. also the Judgment of the O.L.G. Bremen, cited in note 75, below. at pp. 114–117.

[51] *Cf. loc. cit.* in note 3, above (1952), p. 313 *et seq.*, and, on similar lines, Schwebel, *loc. cit.* in note 33, above. See, however, the discussion on this matter in the "Institut de Droit International," 44 (II) *Annuaire* (1952), p. 305 *et seq.*, in particular p. 318, when a draft resolution on this very point was rejected by twenty votes to sixteen votes, with twenty-two abstentions, and the Arbitral Award in *Alsing Trading Company, etc.* v. *Greece* (1954), *International Law Reports 1956*, p. 633 at p. 636.

faith on the part of the State taking such measures, there is a contravention of the minimum standard of international law. To this extent, the clause in Article III on the sanctity of undertakings is merely declaratory of international customary law.

It may be wondered whether, in aiming at so high a degree of sacrosanctity of foreign investments in this clause and in Article II of the *Draft Convention*,[52] the draftsmen have not erred on the side of freezing the *status quo*. This question is hardly answered by recitation of the maxim: *Pacta sunt servanda*. Actually this is merely a *petitio principii*, for there is, as usual, a relevant counter-maxim: *Omnis conventio intellegitur rebus sic stantibus*.

The question, therefore, arises whether, in the *Draft Convention*, enough safety valves are provided to allow for the dynamics of events in mid-twentieth-century world society. Even if it were a party to the Convention, a capital-importing State, or a State granting a concession, would always remain free to insist on reservations in favour of its own national *ordre public* being incorporated in the original undertaking. Secondly, whatever the legal system to which an undertaking under Articles II and III were subject,[53] it would be likely to provide a number of grounds of temporary or permanent liberation from undertakings given. In all such cases, measures taken on either of these grounds could not be held to be incompatible with such an undertaking. Thirdly, within admittedly narrow confines, the *Draft Convention* itself allows for measures derogating from the Convention.[54] Fourthly, it it always possible to modify a pledge with the consent of the other party concerned, and the history of foreign investment over the last half-century appears to disprove the legend of the all-powerful and ruthless foreign investor. He illustrates more readily the inherent vulnerability of economic, as compared with political, power, so vividly depicted by Bertrand Russell.[55] Thus, on closer examination, the *Draft Convention* leaves more scope for changing conditions than is apparent at first sight.

[52] See also under III, above.
[53] See under III, above.
[54] See under II (c), above.
[55] *Power*, 1938, *e.g.*, p. 126.

(f) *Compensation*

Under Article II, lawful expropriation calls for the payment of "just and effective" compensation. To be just, compensation must be determined at, or prior to, the time of deprivation of the property and represent its "genuine value." To be effective, it must be paid in transferable currency with a recognised exchange value, and without undue delay.

This formulation of the last of the constituent elements of lawful expropriation entirely conforms with international customary law. While illegal confiscation primarily calls for restitution, lawful expropriation requires merely full compensation.[56] If sufficient reasons of national public policy for interference with foreign property exist, international law to this extent relaxes the duty of a State under the minimum standard to protect—and itself not to interfere with—the property of foreign nationals. Nonetheless, in accordance with the liberal views of the nineteenth century when these rules crystallised, any State interference with private property, even in such extenuating circumstances, is still inherently suspect. It is for the State concerned to prove its law-abidingness by doing, at the earliest moment, the next best thing to leaving the property unmolested: settling and paying full compensation.

V. "Without Prejudice"

By Article VI of the *Draft Convention*, "the provisions of this Convention shall not prejudice the application of any present or future treaty or municipal law under which more favourable treatment is accorded to nationals of any of the Parties."

The object of this Article is to prevent what are intended as minimum standards in the field of private foreign investment from being interpreted as constituting an upper ceiling for the treatment of foreign nationals.

This leaves unaffected the complementary issue raised above.[57] The grant of more favourable treatment than is prescribed by the *Draft Convention* to nationals of one Contracting Party, to the

[56] See further *loc. cit.* in note 15, above (1957), p. 654 *et seq.*
[57] See under II and IV (d), above.

exclusion of others, may be viewed by the latter as amounting to discriminatory measures under Articles I and III of the *Draft Convention.*

VI. Disputes

In accordance with Article VII of the *Draft Convention*,

> "1. Any dispute as to the interpretation or application of the present Convention may, with the consent of the interested Parties, be submitted to an Arbitral Tribunal set up in accordance with the provisions of the Annex to this Convention. Such consent may take the form of specific agreements or of unilateral declarations. In the absence of such consent or of agreement for settlement by other specific means, the dispute may be submitted by either Party to the International Court of Justice.
>
> "2. A national of one of the Parties claiming that he has been injured by measures in breach of this Convention may institute proceedings against the Party responsible for such measures before the Arbitral Tribunal referred to in paragraph 1 of this Article, provided that the Party against which the claim is made has declared that it accepts the jurisdiction of the said Arbitral Tribunal in respect of claims by nationals of one or more Parties, including the Party concerned."

(a) *Scope and character of the arbitral and judicial jurisdiction*

The arbitral settlement of any dispute between the Contracting Parties regarding the interpretation or application of the *Draft Convention* remains optional. Provision is, however, made for the "compulsory" or, rather, automatic jurisdiction of the International Court of Justice in the last resort. By way of contrast, extension of jurisdiction of the tribunals to disputes between Contracting Parties and nationals of other Contracting Parties who allege that they have been injured by measures in breach of the Convention, remains optional and limited to the arbitral level. Even if the draftsmen had wished otherwise, they would have been barred by Article 34 of the Statute of the International Court of Justice from securing so extensive a jurisdiction on the level of the World Court.

It is not likely that any Contracting Party would lightly make a general declaration under paragraph 2 of Article VII. Neither in Article VII nor in the Annex on the Arbitral Tribunal is any provision made for checking frivolous claims by nationals of Contracting Parties, other than by use of the general power granted to the tribunal to settle all matters relating to costs or, under its freedom in matters of procedure, to insist on adequate security for costs being given in advance.

The solution in classical international law of leaving the government concerned with exclusive responsibility for submitting claims of its nationals to arbitral or judicial settlement may not constitute an absolute guarantee against undeserving cases coming before an international judicial organ. It may also mean that deserving cases never reach this stage. Yet, even this eventuality appears a lesser evil than the solution favoured by the authors of the *Draft Convention*.

(b) *Constitution of the arbitral tribunal*

Under section 1 of the Annex to the *Draft Convention*,

> "The Arbitral Tribunal referred to in Article VII of the Convention shall consist of three persons appointed as follows: one arbitrator shall be appointed by each of the parties to the arbitration proceedings and a third arbitrator (hereinafter sometimes called 'the Umpire') shall be appointed by agreement of the parties or, if they shall not agree, by the President of the International Court of Justice, or, failing appointment by him, by the Secretary-General of the United Nations. If either of the parties shall fail to appoint an arbitrator, such arbitrator shall be appointed by the Umpire. In case any arbitrator appointed in accordance with this Article shall resign, die or become unable to act, a successor arbitrator shall be appointed in the same manner as herein prescribed for the appointment of the original arbitrator and such successor shall have all the powers and duties of such arbitrator."

This section has been drafted with an eye on the unfortunate experiences with the ex-Satellite Powers of the Hitler-Mussolini Axis,

the hardly encouraging opinion of the International Court of Justice on *Interpretation of Peace Treaties* (*Second Phase*)[58] and the flaw in the Anglo-Iranian Concession Agreement of 1933.[59]

It would perhaps be advisable to avoid the numbering of the umpire as a "third" arbitrator. This invites the kind of mechanical thinking displayed in the majority opinion of the International Court on the *Interpretation of Peace Treaties* (*Second Phase*). Nevertheless, the express provision made in section 1 of the Annex for the umpire to appoint a national arbitrator in default of appointment by the Party concerned should constitute an adequate safeguard against a repetition of this particular experience. Similarly, the cumulative provision made for persons competent to appoint an umpire in the case of disagreement between the Parties disposes of one of the potential difficulties under the pattern of the Anglo-Iranian Concession Agreement.

Further provision is made in sections 2 and 3 of the Annex to forestall other forms of possible obstruction to the constitution of the arbitral tribunal and the initiation of proceedings before it. These may be taken to be self-explanatory:

> "2. Arbitration proceedings may be instituted upon notice by the Party instituting such proceedings (whether a Party to the Convention or a national of a Party to the Convention, as the case may be) to the other Party. Such notice shall contain a statement setting forth the nature of the relief sought, and the name of the arbitrator appointed by the Party instituting such proceedings. Within 30 days after the giving of such notice, the adverse Party shall notify the Party instituting proceedings of the name of the arbitrator appointed by such adverse Party.
>
> "3. If, within 60 days after the giving of such notice, instituting the arbitration proceedings, the Parties shall not have

[58] *Cf.*, for instance, K. S. Carlston, "Interpretation of Peace Treaties," 44 A.J.I.L. (1950), p. 728 *et seq.*; Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), p. 284 *et seq.*, and, for a more critical view of the matter, 4 *Current Legal Problems* (1951), p. 11 *et seq.*, and *loc. cit.* in note 15, above (1957), pp. 450 *et seq.* and 523 *et seq.*

[59] See further D. H. N. Johnson, "The Constitution of an Arbitral Tribunal," 30 B.Y.I.L. (1953), p. 152 *et seq.*

agreed upon an Umpire, either Party may request the appointment of an Umpire as provided in Article 1 of this Annex."

VII. Breaches of the Convention, including Non-Compliance with Awards

In accordance with Article IV of the *Draft Convention*,

> "Any breach of this Convention shall entail the obligation to make full reparation. The Parties shall not recognise or enforce within their territories any measures conflicting with the principles of this Convention and affecting the property of nationals of any of the Parties until reparation is made or secured."

Moreover, it is stipulated in Article VIII that

> "If a Party against which a judgment or award is given fails to comply with the terms thereof, the other Parties shall be entitled, individually or collectively, to take such measures as are strictly required to give effect to that judgment or award."

(a) *Reparation*

The breach of the rules underlying the principle of consent brings those on international responsibility into operation, and one of the primary rules under this heading is the duty to make full reparation.[60] Thus, the first sentence of Article IV may claim to be merely declaratory of international customary law.

(b) *A new international quasi-order*

In mature systems of municipal law, the legal effects of tortious and criminal acts are regulated by rules of *jus cogens*, *ordre public* or public policy. International customary law lacks any corresponding public order.[61] In unorganised international society, the legal effects of international torts are, therefore, necessarily limited to the *inter se* relations between the tortfeasor and the injured

[60] See further *loc. cit.* in note 15, above (1957), pp. 562 and 653 *et seq.*
[61] See further *loc. cit.* in note 47, above (1955), p. 376 *et seq.*

party. In other words, on this level of loose social integration, the principle of the relativity of torts reigns supreme.

(1) *The relativity of international torts.* Attempts have been made, and are relied on in the Commentary on the *Draft Convention*,[62] to supply the missing rule—transforming a relative wrong into an absolute wrong, *i.e.*, one which everybody must treat as such —in the form of a general principle of law recognised by civilised nations and epitomised in the maxim: *ex injuria jus non oritur.* In this formulation, the maxim is a fairly recent addition to the legal vocabulary. It is, however, well established both in Anglo-American and in Continental laws of tort, but with one significant difference. It is known there as *ex delicto jus non oritur.*

As is so often the case, legal experiences to the opposite effect are telescoped into a counter-maxim: *ex facto jus oritur.* Both maxims summarise some of the relevant rules in a number of legal systems of civilised nations. It, therefore, still remains to be established whether the alleged general principle of law is based on one or the other maxim or whether it is supposed to lie between the two extremes.[63]

Actually, the substitution of *injuria* (injury) for *delictum* (tortious act) is an instructive illustration of a legal *petitio principii.* If *injuria* means any injury, irrespective of whether it is recognised by law, proper evidence has to be furnished for the proposition that international law recognises so wide a notion of international torts. If *injuria* is used in any narrower sense, it is synonymous with *delictum* and, then, the maxim leaves matters exactly where they were before its invocation. Thus, the confiscation of property in violation of promises made constitutes a breach of the pledged word and of good faith. If the nationals of a foreign State are the objects of such action, an international tort against their home State has been committed.[64] In these relations, the *ex delicto* maxim applies, but is completely redundant.[65]

If the tortfeasor State disposed abroad of the confiscated property

[62] *Cf. loc. cit.* in note 10, above, p. 13.
[63] See *loc. cit.* in note 15, above (1957), p. 473 *et seq.*
[64] See under IV (e), above.
[65] See further *loc. cit.* in note 15, above (1957), p. 627 *et seq.*

or of produce from confiscated mines or estates, this would amount to a further tortious act against the home State of the nationals so affected. Yet what evidence is there of a legal rule that every tort against State X obliges State Y to treat such an act as a more serious contravention than an international tort committed against itself? State Y is always free to condone a tort committed against itself. If, however, the alleged general principle of law applied, State Y would have no choice but to apply this rule as one of international *jus cogens*. At this point, the function of the maxim *ex injuria* becomes plain. It is to serve as an apparently self-evident substitute for a rule which would produce the desired result. In fact, this effort amounts to an intensive exercise in surreptitious law-making.[66]

This is far from saying that the principle of the relativity of international torts is either desirable *de lege ferenda*, or that international law lacks legitimate means of avoiding so asocial, or antisocial, a result. Admittedly, however, the assertion that the *ex injuria* maxim expresses an "important" legal principle of existing international customary law,[67] could only gain from more convincing attempts than have been made so far to discharge the burden of proof for this proposition.

(2) *The governing rules*. In the absence of other operative rules of international customary law and general principles of law recognised by civilised nations, the matter is regulated by the rules of international law governing the principle of sovereignty. In other words, States may please themselves whether they desire to recognise or apply foreign laws—or titles based on such laws—which are alleged to be tainted by breaches of international law against themselves or third States. This must be so; for, in the absence of treaty obligations, a legal duty to apply *any* foreign municipal law or to recognise *any* title derived from such law exists only in two exceptional cases.

In the first place, this would be so if the non-application or non-recognition of foreign law would lead to a miscarriage of

[66] *Loc. cit.* in note 10, above, p. 13. See further 9 *Current Legal Problems* (1956), p. 241 *et seq.*
[67] *Loc. cit.* in note 10, above, p. 13.

justice of such magnitude as to amount to a breach of the rule on the minimum standard of international law in favour of foreign nationals.[68] Secondly, in the few cases in which the application of specific rules of international law presupposes reliance on a system of municipal law—as, for instance, determination of the nationality of an individual [69]—the non-recognition of foreign public acts may be incompatible with a State's fulfilment in good faith of its duties under international law.[70]

In all other cases, the recognition and application of a foreign system of municipal law is still regulated by considerations of justice, comity and reciprocal interest. As such, none of these is a substitute for one of the three forms in which alone rules of international law can be generated.[71]

In this respect, English judicial practice is instructive. Subject to significant reservations regarding the supremacy of statute law, English courts apply international law as part of the law of the land. Nonetheless, they steadfastly refuse to examine the compatibility of the law of other States with international law in situations in which the English rules on the conflict of laws refer to such foreign law. Even when British subjects are the objects of measures as objectionable as illegal confiscation of property, no exemption to the above rule is thought permissible.[72]

[68] See further *loc. cit.* in note 15, above (1957), p. 200 *et seq.*

[69] See further *ibid.* p. 354 *et seq.*

[70] The views expressed in 9 *J. of Public Law* (1960), at p. 166, appear to call for these qualifications.

In the relations between members of the United Nations, the principle of good neighbourliness requires the recognition and application of foreign municipal law in all cases in which common justice demands this, and no grounds of national public policy militate against such a co-operative attitude. See further *loc. cit.* in note 15, above (1957), pp. 50–51 and 218, and in note 47, above (1955), pp. 319–320.

[71] *Loc. cit.* in note 15, above (1957), p. 25 *et seq.*

[72] For the relevant case-law prior to the Anglo-Iranian Oil Dispute, see, for instance, Sir Arnold McNair, *Legal Effects of War* (1948), p. 361; K. Lipstein, "Recognition of Governments and the Application of Foreign Law," 35 *Grotius Society Transactions* (1949), pp. 187–188; J. H. C. Morris, *Cases on Private International Law* (1951), p. 25; E. D. Re, *Foreign Confiscations in Anglo-American Law* (1951), p. 128 *et seq.*; F. Morgenstern, "Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts, etc.," 4 I.L.Q. (1951), p. 326 *et seq.*, and G. A. van Hecke, "Confiscation and the Conflicts of Law," *ibid.* p. 345 *et seq.*

The addition of the words "as are not contrary to International Law" to Rule 6 in the 1955 ed. of Oppenheim's *International Law* (ed. H. Lauterpacht,

It is arguable that, in taking this position, English courts mean to apply international law. They may be thought to show an absolute, and perhaps unnecessary, respect for foreign territorial sovereignty, even in circumstances in which good faith and the sanctity of the pledged word should counsel a different course.[73] The very basis of this argument is, however, of doubtful validity. On settled grounds of public policy, English courts are free to refuse to apply any foreign law even if this is not tainted in any way by an alleged breach of international law.

In these circumstances, it would be difficult to prove that their regard for territorial sovereignty in the *Luther* v. *Sagor* type of situation [74] is the result of the application of international law rather than of considerations of a more pragmatic character, such as international comity and reciprocity. Moreover, assuming that a third State or its nationals are the objects of an alleged breach of international law, can it really be said that, on the level of international customary law, any such act, even if constituting a breach of international law in relation to such a third State, amounts to a breach of international law *vis-à-vis* the United Kingdom? The most that can be conceded is that, as international customary law lacks any relevant prohibitory rule, English courts are free—*sub specie juris gentium*—to minimise the relativity of international torts.

This is how, in recent and directly relevant cases, German,[75]

Vol. I, Sect. 75, pp. 138–139), as compared with the 1948 ed. (ed. H. Lauterpacht, Sect. 75, p. 133) should also be noted. Similar adjustments were made in Sect. 115aa (1948 ed., p. 242; 1955 ed., p. 267). *Cf.* also H. Lauterpacht, *Recognition in International Law* (1947), p. 285, and the note on the *Rose Mary*, Camb.L.J. (1954), p. 20.

[73] If such a self-delusion had been an operative factor, it would have deserved the strictures made recently in an animated, but perhaps somewhat subjective, contribution to this topic (J. H. W. Verzijl, "The Relevance of Public and Private International Law respectively for the Solution of Problems arising from Nationalisation of Enterprises," in *Makarov Festgabe* (1958), p. 547). *Cf.* also Sir Arnold McNair, *loc. cit.* in note 69, above, p. 322, and L. A. E. Hjerner, "The General Approach to Foreign Confiscations," 2 *Scandinavian Studies in Law* (1959), pp. 202–203.

[74] [1921] 3 K.B. 532. *Cf.* also M. Zander, "The Act of State Doctrine," 53 A.J.I.L. (1959), p. 826 *et seq.*, and the Reply by W. H. Reeves, 54 *ibid.* (1960), p. 141 *et seq.*

[75] *N.V. Verenigde Deli-Maatschapijen and Another* v. *Deutsch-Indonesische Tabak—Handelsgesellschaft* (Oberlandesgericht Bremen, August 21, 1959—unpublished). *Cf.* also M. Domke, "Indonesian Nationalisation Measures before Foreign Courts," 54 A.J.I.L. (1960), p. 305 *et seq.*, and H. W. Baade, *ibid.* 54 (1960), p. 801 *et seq.*

Italian [76] and Japanese [77] courts approached the issue. While the question before the German court concerned the ownership in tobacco shipped from Indonesia to Germany after the nationalisation of tobacco concessions which had formerly been operated in Indonesia by Netherlands subjects, that before the Italian and Japanese courts was the legality of the titles to oil shipped from Iran after the nationalisation of the oil-producing industry in Iran. Each of these courts considered the alleged incompatibility of the titles of the defendants with international law in the light of their own municipal public policy. As they found that the acts of nationalisation at issue had not been contrary to international law, they could avoid concerning themselves, otherwise than *en passant*, with the problem whether, under international law, they were bound to refuse recognition to titles which, in relation to the United Kingdom, constituted breaches of international law.

In the *Rose Mary* [78] before the Supreme Court of Aden, however, Campbell J. reinterpreted *Luther* v. *Sagor* in such a way as to restrict its *ratio decidendi* to acts of confiscation inside the confiscating country against nationals of the confiscating State, as distinct from foreign nationals. In this way, he attempted to restore to the English judiciary an otherwise lost discretionary power. Concern that this distinction was incompatible with the whole weight of applicable precedents probably accounts, at least in part, for the reserve with which this judgment of a British colonial court has been received even in the United Kingdom.[79]

[76] *Anglo-Iranian Oil Co.* v. *S.U.P.O.R. Co.* (*The Miriella*), *International Law Reports, 1955*, pp. 19 and 23.
For the special meaning of international public policy in Art. 31 of the Preliminary Rules of the Italian Civil Code, see *ibid.* p. 38.

[77] *Anglo-Iranian Oil Co.* v. *Idemitsu Kosan Kabushiki Kaisha*, *ibid. 1953*, p. 305. *Cf.* also Seidl-Hohenveldern, *loc. cit.* in note 22, above, p. 47 *et seq.*, and W. Niederer, "Einige Grenzfragen des Ordre public," 11 *Annuaire Suisse de Droit International* (1954), p. 91 *et seq.*

[78] *Anglo-Iranian Oil Co., Ltd.* v. *Jaffrate and Others* (*The Rose Mary*) [1953] 1 W.L.R. 246.

[79] See, for instance, *Re Claim by Helbert Wagg & Co., Ltd.* [1956] 1 Ch. 323 at 346–349; D. P. O'Connell, "A Critique of the Iranian Oil Litigation," 4 I.C.L.Q. (1955), p. 276 *et seq.*; G. C. Cheshire, *Private International Law* (1957), p. 139 *et seq.*; Dicey's *Conflict of Laws* (ed. by J. H. C. Morris and Others—1958), pp. 16, 666–667, and 1006–1007; E. J. Cohn, "Auslandsenteignung im englischen Internationalen Privatrecht," in *Janssen Festschrift* (1958), p. 61 et seq.; J. S. Ziegel, "Confiscation in English Private International Law," 6 *McGill L.J.* (1959), p. 1 *et seq.*; R. Graveson, *The Conflict of Laws* (1960), p. 570; J. H. C. Morris,

It is extremely doubtful whether this judgment should be viewed as a lance broken in the cause of the supremacy of international law over municipal law. It is perhaps more realistic to view it as an effort to reassert a freedom to deny recognition of foreign municipal law as a means of judicial retaliation. This may involve the application of international law, but then only because a national legislature or judiciary chooses to temper its discretionary powers by applying this test in deciding whether its public policy requires such action.

If States desire to find a substitute for the shortcomings of the principle of the relativity of international torts, they are not condemned to rely on any spurious general principle of law. They are always free to achieve this object above board, that is to say, by means of a treaty. If the *Draft Convention* ever came into force, the second sentence of Article IV would produce this result. Until reparation was made or secured, it would prevent Contracting Parties from recognising or enforcing measures conflicting with the "principles" of the Convention and affecting the property of nationals of the Contracting Parties.

It is conceivable that, on the level of integration to be attained by the *Draft Convention*, this clause would be merely declaratory of otherwise implied intentions of the Contracting Parties to the same effect. Yet, even in the *inter se* relations of the Parties to this Convention, it would be inadvisable to take for granted so large a measure of inter-capitalist solidarity. Neither the Preamble nor the other provisions of the *Draft Convention* provide sufficient clues to justify such an inference.

It would strengthen Article IV if the words "the principles of" were deleted from the second sentence. They invite unnecessary controversy on possible distinctions between principles and mere detail. If, however, the object of these words is to create an obligation

Cases on Private International Law (1960), p. 348, and P. R. H. Webb and D. J. L. Brown, *A Casebook on the Conflict of Laws* (1960), pp. 448–449 and 453–454. *Cf.* also the excellent survey of recent practice and literature in W. Birke, *Die Konfiskation ausländischen Privatvermöyens, etc.* (1960), p. 136 *et seq.*, and the case notes on the *Rose Mary* case by H. W. Baade, 3 *Jahrbuch für Internationales Recht* (1954), p. 132 *et seq.*, and on *Re Helbert Wagg* by M. Mann and E. Lauterpacht, 5 I.C.L.Q. (1956), p. 295 *et seq.*, and Hjerner, *loc. cit.* in note 70, above, p. 186.

of Parties not to recognise or enforce measures taken by non-Parties, this intention should be more articulately expressed. It would probably also be advisable not to make any bones about the constitutive character of this sentence and to explain frankly the need for this addition to the growing body of rules of the present-day international public quasi-order, *i.e.*, rules of international public policy created by way of multilateral treaties.

(c) *The enforcement of awards*

In section 6 of the Annex to the *Draft Convention*, it is stipulated that "any such award rendered in accordance with the provisions of this Annex shall be final and binding upon the parties and shall be published. Each party shall abide by and comply with any such award rendered by the Arbitral Tribunal."

The reference to the Annex in Article VII of the *Draft Convention* [80] suggests that the Annex is to be regarded as an integral part of the Convention. Thus, in the absence of any special clause on the subject in the *Draft Convention* or the Annex, any failure to comply with an award would amount to a breach of the Convention and would bring Article IV into operation.[81] Any interested party would also be entitled to bring a dispute regarding the alleged non-compliance of another Contracting Party before an arbitral tribunal under Article VII of the *Draft Convention*.

As it is, no Contracting Party need consult any organ on the issue whether another Contracting Party has actually failed to give effect to the award of an arbitral tribunal under the Convention or to a judgment of the International Court of Justice under Article VII of the *Draft Convention*. It is provided in Article VIII that a Contracting Party, alone or together with other Contracting Parties, may "take such measures as are strictly required to give effect to that judgment or award." At this point, we are back in a state of auto-interpretation of rights and duties as in the international customary law of old.

It may be thought that, once an award or judgment is available, the danger of any error regarding the alleged non-compliance of a

[80] See under VI, above.
[81] See prior to VII (a), above.

party with an award or judgment is considerably diminished. Whenever the issue is one of the payment of a liquidated sum, this is certainly true. In cases in which reparation has to be made in kind or the judgment is of a declaratory character, the position may, however, well be different.

Even in the case of a monetary award or judgment, the freedom to proceed against a defaulter granted by Article VII to a Contracting Party is of alarming liberality. On the face of it, the measures he can take are not limited to steps of an economic or administrative character, but may include even the application of force.

This raises squarely the compatibility of Article VIII of the *Draft Convention* with the Charter of the United Nations. Under Article 2 (4) of the Charter, members must refrain in their international relations "from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

In the wider and probably better construction of this paragraph, it rules out any threat or use of force other than in self-defence or collective defence against armed aggression under Article 51, or action under Articles 106 and 107 of the Charter of the United Nations.[82] It is, however, also possible to hold the view that the use of force for the purpose of executing an award or judgment can be squared, at least in spirit, with the Purposes of the United Nations, for one of these Purposes—actually the first and foremost mentioned in Article 1 of the Charter—is to maintain international peace and security, and to that end, *inter alia*, to bring about "by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which may lead to a breach of the peace." If a State fails to carry out an award or decision of an international judicial institution, it itself may be considered as having acted contrary to this Purpose of the United Nations. Then, subject to the ultimate control by the Security Council under Chapter VII of the Charter,

[82] See further the Report on "Some Aspects of the Principle of Self-Defence in the Charter of the United Nations," in *Report of the 48th Conference of the International Law Association* (1960), p. 563 *et seq.*

the use of force by an aggrieved Party may be viewed as a vindication of this Purpose of the United Nations. Yet, even so, it would be difficult to maintain that a State acting in this way keeps within the bounds of "peaceful means."

In substance, this argument comes near to that advanced by the United Kingdom in the *Corfu Channel* (*Merits*) case in justification of its "judicial" intervention to secure decisive evidence. It has, however, been unequivocally rejected by the International Court of Justice.[83]

The rationale of Article 2 (4) of the Charter offers an additional argument against any lax interpretation. Subject to the reservations stated above, the purpose of this paragraph is to eliminate the threat or use of force on the level of the auto-interpretation of international rights and obligations. While couched in a form complying with the letter of the Charter, any other attempt to justify the use of force by individual States in further contingencies runs counter to its spirit.[84]

In this context, Article 94 (2) of the Charter also calls for consideration. If a party to a case fails to perform its obligations under a judgment of the International Court of Justice, all that the other party is entitled to do is to appeal to the Security Council. It is then entirely left to the Council whether to make recommendations or decide upon measures to be taken to give effect to the judgment. This is the limit of what, under the Charter, members of the United Nations may do if, in their view, another party has failed to comply with a judgment of the World Court. It appears, therefore, that, *a fortiori*, they are not meant to be free to resort to self-help for the purpose of enforcing an award of a mere arbitral tribunal or a judgment of the World Court by leave of a treaty between some member States.

One difficulty remains. If, on a treaty basis, States consent in advance to measures including the application of force against them in stipulated contingencies, it is arguable that the application of such force is outside the range of Article 2 (4) of the Charter.

[83] See further *I.C.J. Reports, 1949*, p. 35, and *loc. cit.* in note 78, above.

[84] See, for a further reservation which, however, applies only if a State refuses to submit disputes to any form of peaceful settlement, *loc. cit.* in note 47, above (1955), p. 354.

This paragraph, it may be thought, is limited to force applied *ad invitum*.

The closest analogy to this type of situation which, so far, has arisen in United Nations practice is intervention by consent in the simple form as presented by the Anglo-American interventions in the Lebanon and Jordan and, complicated by the establishment of a puppet régime, in the case of the Russian intervention in Hungary.[85] To judge by these experiences, the sovereign equality of members of the United Nations—one of the Principles on which, in accordance with Article 2 of the Charter, the organisation is based —is compatible with any amount of limitation of this status by consent, provided that such a dependence is not successfully challenged by other member States in any of the United Nations organs. Then, there is no reason why, by consent, an otherwise illegal intervention should not become legalised.

The use of force by consent given in advance under a treaty can be similarly justified. Acceptance of this argument has, however, far-reaching implications. It provides powerful contracting parties to any such convention with handy grounds for justifying the use of force in circumstances in which this may be far from uncontroversial. Thus, the sponsors of the *Draft Convention* could do no worse than reconsider Article VII and, in particular, three aspects of the issue. First, what effective sanctions other than the application of force might be devised? Second, if forcible sanctions cannot be entirely ruled out, what is the absolute minimum required for the purpose? Third, would it be possible to institutionalise the various phases of such coercion as is considered indispensable?

If greater attention were paid to these aspects of the matter, it should be possible to avoid any conflict in letter and spirit with the obligations of the Contracting Parties under the Charter of the United Nations and, even more important, misapprehensions on the intentions of capital-exporting countries. Otherwise, the *Draft Convention* may well be judged by this Article and found seriously wanting.

[85] See further the writer's "The Forms of Sovereignty," 10 *Current Legal Problems* (1957), p. 284 *et seq.*, and "Hegemonial Intervention," 13 *Year Book of World Affairs* (1959), p. 236 *et seq.*

THE UNITED NATIONS AND OUTER SPACE

BIN CHENG

THE United Nations and its specialised agencies have so far played a useful, though subordinate, role in co-ordinating the efforts of nations in space research,[1] which is now rapidly moving beyond the purely exploratory stage into the phase of military and commercial exploitation.

In the military field, apart from the development of military missiles and satellites providing general information which may be of military value, such as the geodetic satellites, the United States was reported in November 1959 to have placed contracts for its first space vehicle, known as the Dyna-Soar, which is intended eventually to be capable of carrying bombs and of shooting down missiles and satellites. In 1960, it successfully launched on May 24 and December 20 two infra-red missile detector satellites, being part of the Missile Defence Alarm System (MIDAS). By means of photocells which, already in the summer of 1958, were said to be capable of detecting the heat emissions from ballistic missiles a few seconds after they had been launched more than 1,000 miles away, MIDAS will operate in conjunction with the Ballistic Missile Early Warning System (BMEWS) and provide a warning some thirty minutes before impact, instead of the fifteen minutes afforded by BMEWS alone. Moreover, a reconnaissance satellite containing photographic and related equipment, the SAMOS II (Satellite and Missile Observation System), was successfully put into orbit on January 31, 1961, from Point Arguello, California.[2]

[1] *Cf., inter alia*, the following United Nations (UN) documents: *Report of the Secretary General on Para. 1 (a) of General Assembly resolution 1348 (XIII)* [of December 13, 1958, establishing the *Ad Hoc* Committee], A/AC.98/4 (June 16, 1959); *Report of the Ad Hoc Committee on the Peaceful Uses of Outer Space*, A/4141 (July 14, 1959); Economic and Social Council (ECOSOC) (XIII), General Review of the Development and Co-ordination of the Economic, Social and Human Rights Programmes and Activities of the UN and the Specialised Agencies as a Whole, *24th Report of the Administrative Committee on Co-ordination to ECOSOC*, E/3368 (May 10, 1960), Part V: "Peaceful Uses of Outer Space," and Annex II.

[2] "SAMOS in Orbit," *Flight* (February 11, 1961), p. 171.

In the commercial sphere, even in 1949, the President of the Executive and Liaison Commission of the Universal Postal Union (UPU) said that the postal rocket was then "being secretly studied in various laboratories."[3] Ten years later, a postal rocket safely delivered, 100 miles from ship to shore, 3,000 letters bearing ordinary stamps franked with the imprint "USSm Barbero."[4] On October 21, 1960, the American Telephone and Telegraph Co. applied to the United States Government for permission to put a space telephone exchange into orbit within a year,[5] and a group of five private industrial concerns in the United Kingdom, on February 2, 1961, formed the British Space Development Co. as a "springboard" for the commercial exploitation of space.[6] A fortnight later, Mr. Bevins, the United Kingdom Postmaster-General, announced that it had been decided to erect a large steerable aerial system for satellite communication tests.[7]

The problem now is the manner in which the United Nations and its specialised agencies will be able to co-ordinate and assist this development, and the extent to which they will be able to regulate and control it, so that man's conquest of space leads him not to his last arena in his internecine struggle for power but ushers in a new era of wondrous achievements in human well-being and progress.

Financial Assistance and Data Clearing

Of the specialised agencies, three deserve mention for their contributions to space research: the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the World Meteorological Organisation (WMO) and the International Telecommunication Union (ITU).

UNESCO's contribution has been primarily financial, in the form of grants to the International Council of Scientific Unions (ICSU), the international non-governmental organisation responsible for the International Geophysical Year 1957–58 (IGY) and the

[3] "The UPU and Commercial Aviation," 10 *IATA Bulletin* (1949), p. 102, at p. 107.
[4] *The Times*, June 9, 1959; *cf.* also experiment of German Rocket Society (*The Times*, May 25, 1959).
[5] *The Times*, October 22, 1960.
[6] *The Times*, February 3, 1961.
[7] *The Times*, February 16, 1961.

subsequent International Geophysical Co-operation (IGC), approximately $100,000 to the ICSU's Special Committee for the IGY (CSAGI) over a period of four years and an annual subvention of about $20,000 to the Federation of Astronomical and Geophysical Services (FAGS).[8] As is well known, the first satellites, both Russian and American, were launched as part of the IGY programme of research. UNESCO has, however, also plans for a more active part in the co-ordination of scientific efforts of its members in space research [9] and for the use of space vehicles in furthering its educational and cultural aims and purposes.[10]

By comparison, the work of WMO in this field has been more substantive. From its inception (1951), WMO took an active part in the organisation of IGY and was instrumental in changing the name from the Third International Polar Year. The Second Congress of WMO, meeting in Geneva in 1955, approved the IGY meteorological programme and invited its members to carry it out.[11] On its recommendation, the WMO Executive Committee in 1956 established the IGY Meteorological Data Centre within the WMO Secretariat,[12] at the same time inviting all meteorological services to supply the Centre regularly with data from their IGY stations.[13] As a result, nearly sixteen million observations taken by some 3,000 meteorological stations over the 550 days of the IGY were catalogued by the Centre and recorded on approximately 16,000 Microcards which are now available at cost to WMO members and the public in complete or partial sets or individually.[14] The

[8] *Appraisals of UNESCO's Programmes for the ECOSOC* (1960), p. 88.

[9] *Cf.* 54 EX/Decisions 6.9 (June 1959); Report of Director-General to the 55th session of the Executive Board (55 EX/8); 55 EX/Decisions 5.5 (November–December 1959); also the work of UNESCO in oeceanographic research, *Report on the Results of the Intergovernmental Conference on Oceanographic Research, Copenhagen, July 1960*, 11C/PRG/7 (October 7, 1960).

[10] Resolution 1.1322 on the use of satellites to combat illiteracy adopted unanimously by the General Conference on November 10, 1960, 11 C/Resolutions (Prov.), p. 11; this rather futuristic resolution may perhaps best be regarded as a posthumous tribute to the originator of the idea, M. Gaston Berger, killed a week previously in a car accident (*The Times*, November 11, 1960).

[11] Resolution 23 (Cg.-II); see also WMO, *IGY 1957–58 Meteorological Programme*, Doc. No. 55, IGY.1 (1956).

[12] Resolution 13 (EC–VIII).

[13] Resolution 14 (EC–VIII).

[14] *Cf.* WMO, IGY 1957–58 Meteorological Data Centre, *Report No. 7 (Microcards of IGY Meteorological Data* (1957); sample card distributed with 9 *WMO Bulletin* (July 1960); "Microcards of IGY Meteorological Data," 8 *ibid.* (1959), p. 153, and 10 *ibid.* (1961), p. 38.

material they contain is, and will continue to be, of enormous interest for research of all types for a long time to come.

In addition, WMO is also currently paying close attention to the use of earth satellites for meteorological observation. On March 23, 1960, a Panel of Experts submitted to the WMO Executive Committee a report on the Study of the Atmosphere and Atmospheric Phenomena by Means of Artificial Satellites, to which was added an addendum [15] on June 10 after the successful launching of TIROS I on April 1, 1960. Previously, on March 31, 1959, Dr. Wexler had submitted a report on Meteorological Satellites to WMO [16] the gist of which was that WMO should consider steps "to promote the use of meteorological satellite data, to ensure rapid dissemination of such data to the meteorological services and to facilitate use of the data in meteorological diagnosis and prognosis." [17]

The Panel of Experts, however, in its Report regarded the problem of meteorological telecommunication as more immediate from the standpoint of both frequency allocation and improvement in technique.[18] It took note of the fact that ITU was then concerned with the allocation of frequencies in connection with space exploration and urged that WMO should take action in time to present the case of meteorological telecommunication adequately at the Extraordinary Radio Conference to be convened by ITU in 1963 to consider the needs of space telecommunication.[19]

Radio Frequency: Allocation and Control

Allegations of treaty violation not proven

From every angle, telecommunication is crucial to the exploration and exploitation of outer space.[20] It is not surprising, therefore, to find here the first treaty law made specifically in relation to outer space. It has sometimes been asserted that

[15] WMO, EC–XII/Doc. 29, and EC–XII/Doc. 29, ADD.1.
[16] Appended to EC–XII/Doc. 29.
[17] EC–XII/Doc. 29, p. 10.
[18] *Ibid.* p. 6.
[19] See below, note 49.
[20] See a most informative survey by E. Wenk, *Radio Frequency Control in Space Telecommunications* (1960).

frequencies used by some of the artificial satellites constituted actual violations of international treaties in force at the time or have resulted in interference with transmissions on internationally protected frequencies. Thus, Mr. A. G. Haley, with reference to SPUTNIK I, said:

> "The first overt or actual violation of the rules and regulations promulgated pursuant to international treaties was occasioned by the U.S.S.R.'s use of the frequencies of 20·005 and 40·002 megacycles. . . . The experimental station of the United States National Bureau of Standards, station WWV in Lanham, Md., has the assigned frequency of 20·0 megacycles. The ITU has assigned a guard band of 10 kilocycles on each side of this frequency to prevent interference with station WWV's operations. The signals of the Soviet satellites at 20·005 megacycles were 5 kilocycles within this zone of interdiction." [21]

Similarly, Mr. M. Aaronson wrote:

> "It is estimated that interference with radio services took place approximately three times in twenty-four hours as the Soviet earth satellite appeared in the airspace over the United Kingdom." [22]

These statements, which unfortunately have gained currency,[23] have, however, not been confirmed by the responsible authorities in the United States and the United Kingdom. In reply to the question:

> "Whether in the opinion of the National Bureau of Standards the use of the frequency of 20·005 mc/s by the Soviet satellites is in violation of the assignment of frequency made by ITU to Station WWV,"

Mr. Allen Barnabei, Communications Liaison Officer of the United States National Bureau of Standards, said categorically:

21 "Law of Outer Space—Radio Control Urgently Needed," U.S. Senate, *Space Law Symposium* (1958), p. 458, at p. 459.
22 "Space Law," *ibid.* p. 273, at p. 280.
23 *Cf.* Wenk, *op. cit.*, note 20, above, pp. 40 and 94.

> "No, the band 19990 to 20010 kc/s may be used for earth space research purposes." [24]

In so far as the United Kingdom is concerned, the G.P.O. Radio Services Department, in answer to an inquiry made by the writer, wrote on October 14, 1960:

> "Although the possibility of interference from satellite transmissions and their associated ground stations to normal radiocommunications cannot be dismissed, no reports of such interference have been received by the Post Office up to the present time."

Similarly, the writer was informed by letter dated October 12, 1960, by the Engineering Information Department of the British Broadcasting Corporation:

> "We ourselves have not experienced any interference of this kind [*i.e.*, from transmissions associated with space exploration] to our Broadcast transmissions in either the Domestic or External services."

Nature of international frequency regulation

It is not possible in this paper to enter into a detailed examination of the international law of telecommunication. Suffice it to say in this context that its nature is essentially co-ordinative and recommendatory rather than determinative and mandatory. Thus, under the successive international telecommunication conventions,[25] the duties of the contracting parties are limited to ensuring that all radio stations under their jurisdiction "are operated in such a manner as not to result in *harmful interference* to the radio services

[24] Letter to the writer dated October 28, 1960. The writer wishes to take this opportunity of acknowledging the kind assistance given to him by the United Kingdom and United States authorities herein referred to and by Mr. Edward W. Allen, Chief Engineer, United States Federal Communications Commission, as well as by the Royal Swedish Embassy in London which, in a letter to the writer dated December 29, 1960, with reference to a United Press dispatch published in the *New York Times* of October 14, 1957, stated: "Contact with the Stockholm Police Force, as well as with other interested parties, has failed to bring to light any evidence of SPUTNIK I having disturbed radio conversations between police headquarters and radio patrol cars."

[25] Thus, those adopted at Atlantic City, 1947 (Art. 44 (1)), 193 UNTS (1954), p. 188; Buenos Aires, 1952 (Art. 45 (1)), Cmnd. 520 (1958); Geneva, 1959 Art. 47 (1)), ITU ed.

or communications of other Members or Associate Members [of ITU] . . . which operate in accordance with the provisions of the Radio Regulations." The Atlantic City Radio Regulations, 1947, which were operative until superseded on May 1, 1961, by the Geneva Radio Regulations, 1959, also provided merely:

> "A country, member of the Union, shall not assign to a station any frequency in derogation of either the table of frequency allocations given in this chapter or the other provisions of these Regulations, except on the express condition that *harmful interference* shall not be caused to services carried on by stations operating in accordance with the provisions of the Convention and of these Regulations." [26]

Apart from verbal changes, the same provision is found in the Geneva Radio Regulations, 1959.[27]

"Harmful interference" was furthermore specifically defined in the Atlantic City Radio Regulations, 1947, as:

> "Any radiation or any induction which endangers the functioning of a radio-navigation service or of a safety service or obstructs or repeatedly interrupts a radio service operating in accordance with these Regulations." [28]

The same is true of the Geneva Radio Regulations, 1959, which in fact qualify the latter part of this definition by adding the word "seriously," even though they now include also interference "seriously degrading" a radio service.[29] In a footnote, the term "safety service" was specified in the Atlantic City Regulations as meaning:

> "Any radio service, the operation of which is directly related, whether permanently or temporarily, to the safety of human life and the safeguarding of property. . . ." [30]

Although no such definition is found in the Geneva Radio Regulations, 1959, a similar one is included in Annex 3 to the International

[26] Art. 3 § 3 (No. 88), 194 UNTS (1954), p. 5, at p. 27 (italics added).
[27] Art. 3, § 3 (No. 115), ITU ed.
[28] Art. I, Section IV (No. 69).
[29] Art. I, Section III (No. 93): ". . . or seriously degrades, obstructs or repeatedly interrupts a radio service operating in accordance with these Regulations."
[30] No. 69.1.

Telecommunication Convention, Geneva, 1959, to which the Geneva Radio Regulations are annexed.[31]

These Radio Regulations are not, therefore, intended to prevent the sharing of duly allocated, assigned and registered frequencies by other stations which do not cause "harmful interference." And even where alleged "harmful interference" has occurred, although in principle an obligation exists in respect of the station sharing a frequency assigned to another immediately to "suspend operations upon receipt of advice of this harmful interference,"[32] the matter is to be settled primarily between the two administrations concerned.[33] The Geneva Radio Regulations, 1959, have in fact introduced now the possibility of direct co-ordination between the operating organisations, subject to agreement by the administrations concerned.[34] If the matter cannot be settled by direct agreement between the administrations concerned, it may be reported to the ITU International Frequency Registration Board,[35] whose powers, however, consist merely in investigating the dispute and issuing "a report containing its findings and recommendations for the solution of the problem."[36] What happens if the administrations concerned decline to accept the findings and recommendations of the Board is now stated with unabashed candour in a new paragraph introduced into the Geneva Radio Regulations, 1959:

> "In a case where, as a result of a study, the Board submits to one or more administrations suggestions or recommendations for the solution of a problem, and where no answer has been received from one or more of these administrations within a period of thirty days, the Board shall consider that the suggestions or recommendations concerned are unacceptable to the administrations which did not answer. If it was the requesting

[31] "Any radiocommunication service used permanently or temporarily for the safeguarding of human life and property" (No. 313, Note 1), ITU ed., p. 72.
[32] Atlantic City Radio Regulations (RR), 1947, Art. 11, Section IV (5) (No. 339); similarly Geneva RR, 1959, Art. 9, Section IV (5) (No. 611).
[33] Atlantic City RR, 1947, Art. 14, §§ 1–4 (Nos. 383–389); Geneva RR, 1959, Art. 15, §§ 1–11 (Nos. 704–714).
[34] Geneva RR, 1959, Art. 15, § 4 (No. 707).
[35] Atlantic City RR, 1947, Art. 14, § 6 (No. 391); Geneva RR, 1959, Art. 15, § 13 (2) (No. 717).
[36] Atlantic City RR, 1947, Art. 11, Section VII, § 18 (No. 355); Geneva RR, 1959, Art. 9, Section VII, §§ 44–45 (Nos. 623–633).

administration which failed to answer within this period, the Board shall close the study." [37]

If, after all these indecisive encounters, an administration still finds a need and the will and stamina to persevere with the vindication of its legal rights, arbitration is in principle possible. But even after the latest revision of the text of the International Telecommunication Convention at Geneva, in 1959, the arbitral procedure set out in Annex 4 of the Convention is of a type which, as the Advisory Opinion of the International Court of Justice in the *Interpretation of Peace Treaties* case (1950) has shown, may easily be stultified by the wilfulness of one of the parties to the dispute. For, although provision exists for the Secretary-General of ITU to select the third arbitrator in case of disagreement between the two national arbitrators as to the choice, no remedy is provided in case one of the parties wilfully refuses to appoint its own arbitrator.[38]

Last, but not least, it should be recalled that, in successive international telecommunication conventions, the following reservation is always maintained:

> "Members and Associate Members retain their entire freedom with regard to military radio installations of their army, naval and air forces." [39]

It would follow, therefore, that there is a long way to go yet before the assertion may justifiably be made that the frequency of 20·005 mc/s used by SPUTNIKS I, II and III constituted an infringement of the Atlantic City Radio Regulations, 1947, or of the International Telecommunication Convention, Atlantic City, 1947, as revised in Buenos Aires in 1952. Even though it be true that ICSU's Special Committee for the IGY (CSAGI) did recommend the use of the 108 mc/s channel for space research by means of artificial satellites, this choice had no binding force and was recognised fully at the time to be both arbitrary and temporary.[40]

[37] Art. 9, Section VII, § 46 (No. 634).

[38] See *ICJ Reports 1950*, p. 221, and comments thereon in the writer's *General Principles of Law* (1953), pp. 151–155.

[39] Atlantic City ITC, 1947, Art. 47 (1); Buenos Aires ITC, 1952, Art. 48 (1); Geneva ITC, 1959, Art. 50 (1).

[40] See *op. cit.*, note 20, above, p. 40.

Purpose of and need for frequency control

In pointing out the lack of effective sanction behind international frequency allocations, the intention is not to belittle their importance, but merely to show that parties to international telecommunication agreements have intended to create not an international licensing authority for the mandatory distribution of the frequency spectrum, but an international co-ordinating centre to facilitate the avoidance of mutual interference. For radio interference is usually a two-way traffic—apart from the special case of radio astronomy—and any operating station which interferes with another will itself suffer from the interference. Except where the intention is to jam the broadcast of another, it is therefore to be assumed that every State wishes to ensure the maximum freedom from interference in telecommunication.

Especially in the field of space research, it would indeed be difficult to imagine any State using for its satellites a frequency which is already occupied, without the gravest deliberation and reasons and at the risk of jeopardising the success of these incalculably expensive experiments, costly in terms of both money and scientific efforts. The problem of frequency control in space research consists, therefore, not so much in preventing space and earth-space radio communications from interfering with other transmissions, but rather in clearing certain portions of the radio spectrum so as to protect these communications from interference that might lead not merely to the failure of these experiments, but also serious danger to property, life and even international peace owing to some malfunctioning in the control of space vehicles. This need is even greater in the case of radio astronomy where there is no control over the frequencies of cosmic signals which are, moreover, of extremely feeble intensity.[41]

It is not surprising, therefore, to find that the United Nations *Ad Hoc* Committee on the Peaceful Uses of Outer Space, in its Report submitted to the General Assembly of the United Nations in the summer of 1959,

[41] *Cf. ibid.* p. 61 *et seq.*; also J. H. Oort, "Radioastronomy: An Open Window on the Universe," 26 *Telecommunication Journal* (October 1959), p. 210; and below, note 47.

> " strongly urges that ITU and the States members of the 1959 Administrative Radio Conference of ITU allocate adequate frequencies for space programmes, with adequate bandwidths for the foreseeable needs of space programmes in the next three years." [42]

When the Administrative Radio Conference met in 1959, it had before it recommendations which had been formulated earlier in the year by the International Radio Consultative Committee (CCIR) at Los Angeles [43] and COSPAR of ICSU, the latter forwarded to ITU by its President, Professor H. C. van de Hulst, on August 13, 1959.[44]

The Administrative Radio Conference met at Geneva from August 17, 1959, till December 21, 1959. Simultaneous with the second half of the Radio Conference, the Plenipotentiary Conference also met at Geneva. *Inter alia*, the latter produced a new International Telecommunication Convention while the former a new set of Radio Regulations. The Convention entered into force on January 1, 1961, between parties having deposited their instruments of ratification or accession,[45] while the Radio Regulations, which are annexed to the Convention, on May 1, 1961.[46]

For the first time, the Radio Regulations earmark specific frequency bands for space and earth-space services and radio astronomy observations, although far from always being on an exclusive basis. The important point, however, especially in the case of radio astronomy which, even though it is revealing to man some of the most deeply hidden mysteries of the universe,[47] does not carry the glitter of a military bonus and has to compete with powerful commercial interests for a place in the already highly congested radio spectrum, consists in the international recognition

42 A/4141, para. 69, p. 45; see also below, text to notes 47–49.

43 Docs. 437 (Revised) (April 27, 1959); 531–E (April 22, 1959); 530–E (April 22, 1959); 538–E (April 22, 1959), annexed to *Report of Secretary-General on Para. 1 (a) of GA Resolution 1348 (XIII)*, A/AC.98/4 (June 16, 1959), Annexes II to V.

44 Reproduced *op. cit.*, note 20, above, pp. 47–48.

45 Art. 22 (No. 295).

46 Art. 45, § 1 (No. 1629).

47 *Cf.* R. H. Brown and A. C. B. Lovell, *The Exploration of Space by Radio* (1958); also Prof. M. Ryle's lecture on February 10, 1961, at the Royal Astronomical Society, " The Theory of Universe," *The Times*, February 11, 1961.

of the new status of these various forms of space research. In fact, in addition to the Radio Regulations, the Administrative Radio Conference, 1959, adopted, *inter alia*, two recommendations (Nos. 31 and 32) designed to further the cause of radio astronomy.[48] Furthermore, the Conference also recommended (No. 36) "that an Extraordinary Administrative Radio Conference be convened, in principle during the latter part of 1963" to consider the technical progress in the use of radio communication for space research, to re-examine the frequencies allocated for this purpose and, if necessary, to adopt rules for the identification and control of radio emissions from space vehicles.[49]

Thus, the oldest specialised agency of the United Nations[50] takes the lead in being the first to have introduced a set of rules of international treaty law relating to activities in space.

But it would now appear that, in addition to frequency allocation, what is one of the most urgent problems in this field at the moment is an improvement in radio technology and in the legal and administrative machinery so that there may be a far stricter control over the use of the radio spectrum than has so far been achieved nationally or internationally. Thus, Colonel James D. Flashman, Directorate of Communications, U.S.A.F., wrote:

> "Under concepts by which the frequency spectrum is now used, it is just not possible to guarantee that any portion of the spectrum will be interference free, regardless of national or international intentions or agreements. Controls which would make this guarantee possible simply do not exist. . . . Without positive control, virtually all our activities in space communications and electronics will be conducted in an atmosphere of calculated risk, subject to the whim of the negligent, inexperienced or inept co-user of the spectrum, within whose power it is to wreck completely an operation upon which the prestige of an entire nation may rest. . . . [A] spectrum user must at least be equipped with the tools necessary for him to gage

[48] *Radio Regulations*, ITU ed. (1959), pp. 607 and 608.
[49] *Ibid.* p. 613, at p. 614.
[50] Founded in 1865 as the International Telegraphic Union.

precisely and continuously the total effect of his radiations upon the electromagnetic spectrum." [51]

Here then is an even greater challenge facing the Extraordinary Radio Conference in 1963,[52] all radio engineers and the radio administrations of the world.

Blind Spot in the Sky

In the United Nations itself, the path into space has proved truly steep. Following proposals made by the United States in January [53] and July [54] 1957, and a Soviet counter-proposal put forward in March 1958,[55] the General Assembly on December 13, 1958, approved a revised twenty-Power draft resolution on the establishment of an eighteen-member *Ad Hoc* Committee on the Peaceful Uses of Outer Space.[56] This Committee, which met in May and

[51] "Positive Control of the Electromagnetic Spectrum," *USAF Signal Magazine* (May 1959), quoted *op. cit.*, note 20, above, p. 87, at p. 88.

[52] See note 49, above.

[53] Mr. Lodge, United States delegate, GA (XI), 1st Com., A/C.1/SR 821 (January 14, 1957), p. 41.

[54] Mr. Stassen, United States delegate, UN Disarmament Commission, 5-Power Sub-Committee, July 25, 1957. "Keeping the Peace in Outer Space" (*The Times*, July 26, 1957); "US Proposes Controls on Space Missiles be in Disarmament Pact," United States Information Service, London (USIS), Off.Text, July 26, 1957; *Report on the Proceedings of the Sub-Committee of the UN Disarmament Commission, London, March 18–September 6, 1957*, Cmnd. 333 (1957), pp. 9–10, 17; formalised in Working Paper on Proposals for Partial Measures of Disarmament submitted to the Sub-Committee by Canada, France, the U.K. and the U.S.A., on August 29, 1957, DC/SC.1/66, Cmnd. 333 (1957), p. 96, at p. 98: "VI.—The Control of Objects Entering Outer Space: All parties to the convention agree that within three months after the entry into effect of the convention they will co-operate in the establishment of a technical committee to study the design of an inspection system which would make it possible to assure that the sending of objects through outer space will be exclusively for peaceful and scientific purposes." See also United States proposal of September 2, 1958, to the General Assembly (A/3902).

[55] At a Press conference in Moscow on March 15, 1958, the Soviet Government announced a 4-point proposal: (1) A ban on the use of outer space for military purposes and an undertaking to launch rockets only as part of an international programme. This was dependent on (2) Elimination of foreign military bases, (3) Control, through the United Nations, of the first two points, and (4) Creation of a United Nations body for international co-operation in space research (*Sunday Times*, March 16, 1958). Proposal submitted to the General Assembly on March 17, 1958 (A/3818); see also below, notes 19 and 22.

[56] Draft resolution, A/C.1/L.220/Rev. (November 21, 1958); approved by the First Committee, November 24, 1958, GA (III) A/C.1/SR 995, pp. 245–246; adopted by the General Assembly, December 13, 1958, GA (XIII) A/PV 792; text of resolution 1348 (XIII), GA (XIII), Off.Rec., Supp. No. 18 (A/4080), pp. 5–6. *Cf.* H. J. Taubenfeld, 53 A.J.I.L. (1959), p. 400.

June 1959,[57] was boycotted by the Soviet Union, Czechoslovakia and Poland; nor did India and the United Arab Republic attend.[58] Its Report [59] was considered by the General Assembly at its XIVth session.[60] As a result thereof, the General Assembly decided on December 12, 1959,[61] to establish a twenty-four-member Committee on the Peaceful Uses of Outer Space and to convene an international scientific conference in 1960 or 1961 for the exchange of experience in space research. Apparently cold-shouldered again by the Soviet *bloc*, this new Committee, which was due to report to the XVth session of the General Assembly, has yet made little headway at the time of writing; nor has apparently a date been fixed for the projected scientific conference.

Among the terms of reference of the *Ad Hoc* Committee [62] (and also of the new Committee [63]) was the study of the ways and means to encourage space research and of the legal problems which might arise. The Report of the *Ad Hoc* Committee, at least in regard to problems of space law,[64] is distressingly disappointing. It divided these problems into those " susceptible of priority treatment " [65] and those which were not,[66] and classified among the latter the problem of " determining where outer space begins " [67] and the legal régime of extra-terrestrial bodies.[68]

[57] A/AC.98/SR 1-6; A/AC.98/Agenda 1-3; documents A/AC.98/1-4; working papers A/AC.98/L 1-L 13; Technical Committee A/AC.98/C.1/SR 1-2, 14 (3-13 being closed meetings); Legal Committee A/AC.98/C.2/SR 1-5 and working paper A/AC.98/C.2/L 1. *Cf.* P. C. Jessup and H. J. Taubenfeld, 53 A.J.I.L. (1959), p. 877.

[58] " Space Inquiry Boycotted by Communists," *The Times*, May 7, 1959.

[59] A/4141 (July 14, 1959).

[60] At its 803rd Plenary Meeting, September 22, 1959, the General Assembly on the recommendation of its General Committee (A/4214), included the *Ad Hoc* Committee Report as item 25 in the agenda of the XIVth session. The First Committee considered this item at its 1079th to 1081st meetings on December 11 and 12, 1959.

[61] At the 1079th meeting of the First Commiteee, a draft resolution (A/C.1/L 247) was submitted by twelve Powers, including the U.K., U.S.A. and U.S.S.R., which, as amended by a Belgian proposal (A/C.1/L 289), was adopted *nem. con.*; see *Report of the First Committee on the Report of the Ad Hoc Committee*, GA (XIV) A/4351 (December 12, 1959). This Report was adopted by the General Assembly on December 12, 1959, without discussion (GA (XIV) A/PV 856, p. 752). Text of resolution 1472 (XIV), see GA (XIV), Off.Rec., Supp. No. 16 (A/4354), pp. 5-6.

[62] Resolution 1348 (XIII); see above, note 56.

[63] Resolution 1472 (XIV); see above, note 61.

[64] A/4141, p. 63 *et seq.*

[65] *Ibid.* p. 63 *et seq.*

[66] *Ibid.* p. 67 *et seq.*

[67] *Ibid.* p. 67 *et seq.*

[68] *Ibid.* p. 69 *et seq.*

As regards the first problem, the Report cannot be reproached for having said that it might not be "*susceptible of* priority treatment," inasmuch as States may find it hard to achieve a general agreement. But it could hardly have been with candour that "[t]he Committee noted that the solution of the problems which it had identified as susceptible of priority treatment was not dependent upon the establishment of such limits." [69] The Committee became positively misleading when it expressed the belief that, with the practice of artificial satellites so far passing freely through the airspace of other States,

> "there may have been initiated the recognition or establishment of a generally accepted rule to the effect that, in principle, outer space is, on conditions of equality, freely available for exploration and use by all in accordance with existing or future international law or agreements." [70]

This passage is equivocal. It may be utterly meaningless in simply saying that no State may claim to exercise exclusive territorial sovereignty over a portion of outer space that is not merely an extension upwards of its airspace—a proposition which not many will deny. Or, read in its context, this passage may be calculated fallaciously to suggest that a rule of international customary law already exists obliging States as a positive legal duty to permit the so-called "innocent passage" of foreign non-military satellites through their national airspace. The writer has already previously had occasion to deal at length with the error of this view so that it is not necessary here to repeat the relevant reasons.[71] Suffice it to say that at the most there is only a non-binding usage to this effect.[72]

[69] *Ibid.* p. 68.
[70] *Ibid.* p. 64.
[71] *Cf.* the writer's "Recent Developments in Air Law," 9 *Current Legal Problems* (1956), p. 208, Part I: Airspace Sovereignty and Earth Satellites; "International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites," 6 I.C.L.Q. (1957), p. 487; "The Right to Fly," 42 *Grotius Society Transactions* (1958), p. 99; International Law Association, *Report of the 48th Conference New York* (1958), p. 250; "Problems of Space Law," 7 *The New Scientist* (1960), p. 1256; "From Air Law to Space Law," 13 *Current Legal Problems* (1960), p. 228.
Cf. also Sweden's criticism of the *Ad Hoc* Committee's Report on this score, December 11, 1959, GA (XIV) A/C.1/PV 1079.
[72] *Cf.* Schwarzenberger, *A Manual of International Law*, Vol. 1 (1960), pp. 2 and 27-29.

The refusal of the *Ad Hoc* Committee to face the problem of separating national airspace (or space)[73] from outer space means that it was itself uncertain of the precise geographical scope of its own terms of reference. In other words, the Committee did not purport to know whether it was dealing with problems five miles from the surface of the earth, fifty miles, 500 miles or 5,000 miles! The explanation of the Committee's evasive stand, can, however, be easily found. When this issue was first raised in its Legal Sub-Committee, there was unanimous support for the Chairman in deciding to omit all references to military problems in the Committee's Report.[74] As the determination of the boundary between national space and outer space, the inevitable first step in any rational approach to the legal problems of outer space, depends ultimately on the security interests of States—as writers and representatives of the Soviet *bloc* have not failed to point out—it would appear that, therefore, the Committee decided not only to close its eyes to this basic issue, but also to rationalise and to justify this blind spot in its vision of the heavens.

Reconnaissance and Surveillance Satellites

Any system of international regulation of activities in space which pretends to turn a blind eye to their military aspects is foredoomed. Three problems, in particular, require to be considered: Reconnaissance from space, surveillance from space and the disarmament or demilitarisation of outer space and extra-terrestrial bodies. These three problems may, however, be resolved into two in the sense that surveillance from space, if not consented to, is equivalent to reconnaissance and, if agreed to, forms part of disarmament. The shooting down by the Soviet Union of two United States aircraft,

[73] While the writer believes that the present upper limit of national airspace is conterminous with the terrestrial atmosphere, he considers that, contrary to a very prevalent view, it is not impossible in law by agreement between the States concerned, not only to bring down this limit, but also to *extend* national sovereignty to a greater height from the surface of the earth, although it would not be possible to claim as national territory a portion of outer space that is not a mere extension of national airspace. Therefore, by agreement national space may extend beyond national *air*space. See *op. cit.*, note 71, above, especially 13 C.L.P. (1960), p. 228, at p. 230 *et seq.*

[74] A/AC.98/C.2/SR 5, p. 8.

the U-2 on May 1, 1960, 1,250 miles inside the Soviet Union, and the RB-47 on July 1, 1960, over the Baltic Sea, illustrates admirably the position in international law of two different types of reconnaissance: penetrative and peripheral.

The distinction between penetrative and peripheral reconnaissance was drawn in a statement made by the United States Secretary of State, Mr. Herter, soon after the U-2 incident. Having first mentioned that since the beginning of the Eisenhower Administration the President, under the National Security Act, 1947, had put into effect directives to gather intelligence for the defence and protection of the free world, Mr. Herter continued:

> "Under these directives, programmes have been developed and put into operation which have included *extensive aerial surveillance* by unarmed civilian aircraft, *normally of a peripheral character but on occasion by penetration.*" [75]

This distinction must be taken to mean that penetrative reconnaissance involves unauthorised entry into the territory of the foreign State concerned,[76] or at least espionage in the course of an otherwise legitimate flight, while peripheral reconnaissance is effected by means and devices situated outside that State's territory. Such devices need not, of course, be an aircraft or a satellite. Thus, it was reported in 1957 that:

> "The United States had been 'tapping' Russia's missiles secrets for more than two years with powerful long-range radar and other equipment based near the Black Sea resort of Samsun in Turkey. . . . The equipment was said to have a range up to 1,000 miles." [77]

The very different position which these two types of reconnaissance, penetrative and peripheral, occupy in international law further

[75] USIS, Off.Text, May 10, 1960, p. 2 (italics added); *cf.* also censored version of United States Secretary of Defence Gates' testimony before United States Senate Foreign Relations Committee on the U-2 incident when he was reported to have referred freely to the vital information obtained during the previous four years by United States photographic reconnaissance over the Soviet Union, "Another Alert Ordered for US Forces," *The Times*, June 3, 1960.

[76] See *op. cit.* (1957), note 71, above, and *cf.* Lissitzyn, "The Treatment of Aerial Intruders," 47 A.J.I.L. (1953), p. 559.

[77] *The Times*, October 21, 1957; see also below, text to note 97 *et seq.*

stresses the crucial importance of a clear demarcation between the national airspace or space of a State forming part of its territory and outer space over which its territorial sovereignty no longer extends.

Penetrative reconnaissance

The facts of the U-2 incident, including the trial of the pilot of the aircraft, are already too well known to need repetition here,[78] except perhaps to offer a possible explanation of the timing of that ill-fated flight, since this has aroused a great deal of speculation and criticism.[79] In view of the fact that the aircraft was timed to be over the Soviet Union early in the morning of May 1, when military parades would take place in different parts of the Soviet Union, it may be conjectured that those who planned the flight expected that for that reason the U-2 would be able to gain valuable information regarding the disposition of Soviet forces and details of their latest weapons and other equipment.

On May 18, 1960, the Soviet Union addressed an urgent request to the Security Council to consider the "aggressive acts" of the United States.[80] The Security Council, when convened, declined to adopt the Soviet proposal to condemn the U-2 flight as an "aggressive act."[81] Instead, the Security Council proceeded to the consideration of a resolution proposed by Argentina, Ceylon, Ecuador and Tunisia on May 23, 1960,[82] that is to say, five days after the Soviet complaint had been received. As the Soviet delegate said:

> "True, the four-Power resolution is a separate item on our agenda. But we all know that it came into being as a result

[78] A highly informative and critical account is the NBC telefilm, "The U-2 Affair," broadcast on B.B.C. television on January 2, 1961; *cf.* also Soviet Booklets (No. 76), *Trial of American U-2 Spy Pilot* (London, 1960), containing a summary of the proceedings against Powers, the U-2 pilot.

[79] *Cf.* criticisms voiced by the United States Senate Foreign Relations Committee in *Events Relating to the Summit Conference*, 86th Cong., 2nd sess., Report No. 1761 (June 28, 1960), p. 22 *et seq.*; also "Unhappy Landing," first leader, *The Times*, May 9, 1960.

[80] S/4314 (May 18, 1960), S/4315 (May 19) and S/4315/Corr. 1 (May 20).

[81] Soviet draft resolution S/4321 (May 23, 1960); consideration by the Security Council, May 23–26, 1960, SC (XV) S/PV 857–860.

[82] S/4323 and S/4323/Rev. 2.

> of the Security Council's debate on the item put forward by the Government of the U.S.S.R. Consequently, whether or not that is the intention of the authors of the draft resolution, every one of us, and the public as a whole, will regard the two questions as directly interconnected." [83]

This resolution, adopted on May 27, 1960, (a) recommends that international problems be settled by peaceful means, (b) appeals to member governments to refrain from the use or threats of force in their international relations and to respect each other's sovereignty, territorial integrity and political independence, and (c) requests the governments concerned to continue their efforts to achieve general and complete disarmament under effective international control.[84] According to one's predilection, this platitudinous and equivocal resolution may be construed as mildly condemning either the flight of the U-2 or the shooting down of an unarmed aircraft, or both. But the legality of penetrative reconnaissance remained unresolved.

Commenting on the U-2 incident, Senator Fulbright, Chairman of the United States Senate Foreign Relations Committee, was reported to have said on June 28, 1960, that the gravest mistake in the whole episode was President Eisenhower's assumption of responsibility for the flight. Senator Fulbright said:

> " If chiefs of State begin the practice of personally admitting the violations of each other's sovereignty, the orderly conduct of international affairs will quickly become impossible—as, indeed, it did in Paris last month." [85]

That Senator Fulbright is absolutely correct in his view that the U-2 flight constituted a violation of Soviet territorial sovereignty is so elementary a point in international law that it would be merely flogging a dead horse to labour it here,[86] except perhaps to add a

[83] SC (XV) S/PV 861, p. 16 (May 26, 1960).
[84] S/4328 (XV) adopted on May 27, 1960, SC (XV) S/PV 863, *nem. con.*, Poland and the U.S.S.R. abstaining.
[85] *The Times*, June 29, 1960.
[86] *Cf. op. cit.* (1957), note 71, above, and Q. Wright, " Legal Aspects of the U-2 Incident," 54 A.J.I.L. (1960), p. 836, at p. 853. See an opposite view by Mr. S. M. Beresford, Special Counsel, Committee on Science and Astronautics, United States House of Representatives, " Surveillance Aircraft and Satellite: A Problem

word on the United States official admission, and President Eisenhower's assumption, of responsibility for the flight.

In his statement to the Supreme Soviet on May 5, 1960, breaking the news of the U-2 flight to the world, Mr. Khrushchev said:

> "I do not doubt President Eisenhower's sincere desire for peace. Reason must guide us." [87]

After the United States had denied any intentional violation of Soviet airspace, Mr. Khrushchev in his speech winding up the three-day session of the Supreme Soviet on May 7, when he first revealed that the pilot was captured and alive, still conceded:

> "I fully admit that the President did not know that a plane was sent beyond the Soviet frontiers and did not return,"

even though he added the quip: "But this should make us even more watchful." [88] Late the same afternoon the United States Department of State issued a statement which not only admitted that the U-2 was on a deliberate espionage flight but also vaunted that such flights had been made regularly during the past four years:

> "As a result of the inquiry ordered by the President, it has been established that in so far as the authorities in Washington are concerned there was no authorisation for any such flight as described by Mr. Khrushchev. Nevertheless, it appears that in endeavouring to obtain information now concealed behind the Iron Curtain a flight over Soviet territory was probably undertaken by an unarmed civilian U-2 plane. . . . It is in relation to the danger of surprise attack that planes of the type of unarmed civilian U-2 aircraft have made flights along the frontiers of the free world for the past four years." [89]

of International Law," 27 *J. Air Law & Com.* (1960), p. 107, at p. 113: ". . . U-2 flights were not invasions of Soviet airspace." It would be of interest to know Mr. Beresford's view on the legality of such a flight over the United States undertaken by a similar Soviet aircraft on a similar mission.

In the NBC telefilm referred to above in note 78, Senator Fulbright said, *inter alia*: "Now I think one of the most serious things too growing out of this was our endeavour, on the part of our people, to justify these flights."

87 Quoted in NBC telefilm, cited in note 78, above.

88 *The Times*, May 9, 1960.

89 USIS, Off.Text, May 9, 1960.

In a statement made by Secretary of State Herter two days later (May 9), even the exculpation of "the authorities in Washington" was withdrawn. He said that, although "specific missions of these unarmed civilian aircraft have not been subject to Presidential authorisation," authority for such flights was derived from directives issued by the President under the National Security Act, 1947.[90] In his Press statement of May 11, the President himself added:

> ". . . ever since the beginning of my Administration I have issued directives to gather, in every feasible way, the information required to protect the United States and the free world. . . ."[91]

In Moscow Mr. Khrushchev was reported to have said on the same day: "I was horrified to learn that the President had endorsed these acts."[92]

This open and defiant admission of responsibility for the U-2 flight by the Administration and by the President himself meant that (to use President Eisenhower's own words as contained in his statement of May 11, 1960, in explaining the nature of intelligence activities)[93] the "regular, visible agencies of the Government" which should normally be "divorced from" such "below-the-surface" activities, instead of dissociating themselves from these activities when they had been discovered, blatantly took credit for them as if nothing in the world had happened. Little wonder the Russians felt that insult was being added to injury. Salt was well rubbed into the wound when on May 12 the United States Government handed to the Soviet Government a Note in which it was said:

> "In its Note the Soviet Government has stated that the collection of intelligence about the Soviet Union by American aircraft is a 'calculated policy' of the United States. The United States Government does not deny that it has pursued such a policy for purely defence purposes."[94]

[90] USIS, Off.Text, May 10, 1960, p. 2.
[91] USIS, Off.Text, May 11, 1960.
[92] *The Times*, May 12, 1960.
[93] USIS, Off.Text, May 11, 1960.
[94] USIS, Off.Text, May 13, 1960.

The point of international law, illustrated rather dramatically by the U-2 incident, that "penetrative reconnaissance is an infringement of the legal rights of the State spied" on remains highly relevant even though U-2 flights have been discontinued. This is evident from the following passage in President Eisenhower's broadcast to the American people on May 25, 1960, after his return from the abortive Summit Conference in Paris:

> "In fact, before leaving Washington [for the Conference], I had directed that these U-2 flights be stopped. Clearly their usefulness was impaired. . . . Furthermore, *new techniques, other than aircraft, are constantly being developed.*" [95]

If these new techniques refer to reconnaissance satellites such as MIDAS and SAMOS,[96] then the question whether their flights over the Soviet Union constitute penetrative or peripheral reconnaissance can again only be answered if we know what is the precise upper limit of Soviet national space.

Peripheral reconnaissance

Two facts seem hardly in doubt in regard to the RB-47 incident, even though they have not been admitted by the respective protagonists responsible for them. First, the aircraft was engaged in peripheral reconnaissance.[97] Secondly, the aircraft was shot down over the high seas by Soviet fighters after they had failed to force it into Soviet airspace.[98]

If, on May 1, the Americans were lulled by four years of immunity,[99] what the Russians failed to realise on July 1 was that,

[95] USIS, Off.Text, May 26, 1960, p. 3 (italics added). In hearings before the Senate Foreign Relations Committee on the events leading to the summit conference, United States Secretary of Defence Gates confirmed the suspension of U-2 flights, but intimated that the loss of a valuable source of intelligence would be compensated by other means of which he did not speak in specific terms. *The Times* correspondent in his dispatch interpolated: "the reconnaissance satellites?" (*The Times*, June 3, 1960).

[96] See above, second paragraph of this paper.

[97] *Cf.* "Testing Russian Radar Screens," *The Times*, July 20, 1960.

[98] *Cf.* United States delegate Lodge's speech before the Security Council giving an account, with the aid of maps showing the planned route and the course actually followed by the RB-47, July 25, 1960, SC (XV) S/PV 881 and maps; see also below, notes 1 and 2.

[99] See above, note 75. There is some controversy as to the height at which the U-2 was intercepted. An interesting point in the proceedings against the pilot

thanks to NATO's northern radar chain and other mobile radar stations, every move of the RB-47, even though it maintained complete radio silence, was known to the United States military authorities.[1] Thus, significantly, in his letter to Prime Minister Macmillan, Mr. Khrushchev wrote on August 5, 1960:

> "You, like the statesmen of the United States, insist that the RB-47 plane did not violate the Soviet border. And what, Mr. Prime Minister, are your reasons for this? You did not fly this plane. *You did not see, nor could you track, this aircraft.* The pilots that flew the shot-down aircraft *did not report* to you about their flight or *bearings.* Why do you

(*op. cit.*, note 78, above) is the seeming Soviet anxiety to establish that the U-2 was hit at its maximum altitude of 68,000 feet (pp. 18, 29, 35 and 59). But a caption to the frontispiece (a map showing the course of the U-2), while saying that Powers was flying at 68,000 feet over Afghanistan, states that, when over the Soviet Union, "he was then flying at *nearly* 67,000 feet" (p. 2; italics added). According to United States intelligence sources in the NBC telefilm (see note 78, above): "As Powers neared Sverdlovsk, he reported a flame-out in his jet engine and began to descend to the altitude at which it was possible to restart his engine in the air. The last communication with Powers was about 40,000 feet. . . . [The plane] . . . had been forced down by a mechanical failure and not shot down by a rocket at 70,000 feet as the Soviets later claimed." In view of the fact that it was known that the Russian T-6, T-7 and T-8 anti-aircraft missiles with respectively radar, inertial and infra-red guidance were capable of altitudes of between 60,000 feet (T-6) and eighteen miles (T-8) (see *The Times*, May 7, 1960), even though the NBC telefilm gave the maximum altitude of the U-2 as 90,000 feet, it would not appear impossible that the Russians did succeed in scoring a near-hit and wing the U-2 at an altitude nearing 67,000 feet. The last time a U-2 flew across the Soviet Union without being intercepted, even though detected by Soviet radar, was on April 9, 1960, according to Mr. Khrushchev ("Skandal-Pie in the Sky," *Sunday Times*, May 15, 1960). Maybe what the Americans did not count on was not that the Soviet Union did not have the missiles with an adequate range but radars which could furnish instantaneously data of the course of the aircraft sufficiently precise for the missiles to home on their target; *cf.* below, note 1.

[1] *Cf.* "How the RB-47 was Tracked," *Sunday Times*, July 31, 1960. What the events seem to suggest, however, is that the co-ordination and the interpretation of the monitored data from ground and mobile stations are not instantaneous, but take a long time. This may at least be a partial explanation why eleven days after the shooting down of the RB-47, the State Department still refused all comment on the ground that a full report was awaited (*The Times*, July 12, 1960), but on the twelfth day (July 12) the White House Press Secretary, Mr. James Hagerty, was able to state: "The American RB-47 plane was over international waters and at no time flew over Soviet territory . . ." (USIS, Off.Text, July 12, 1960). On the same date, the United States answered the Soviet Note regarding the RB-47 and maintained that the RB-47 was never less than about thirty miles from Soviet land territory (USIS, Off.Text, July 13, 1960). A full account of the incident was presented by the United States delegate to the Security Council on July 25 (see above, note 98).

> argue so categorically about things which you *cannot know* for sure? "[2]

The answer, however, had already been given on July 26, 1960, by the United States representative at the United Nations, Mr. Cabot Lodge, after the Soviet Union had brought the matter before the Security Council on July 13[3]:

> "I explained yesterday that the United States possesses scientific devices which followed the RB-47 throughout its flight. I am sure that Soviet military authorities would like to know all about these devices, but I can assure you that the United States is not going to give them that satisfaction and it is not going to divulge our military secrets."[4]

Indeed, in the case of the RB-47, the United States was so sure of its facts and of the strength of its legal position that it proposed to the Security Council that the incident should be either investigated by a commission of inquiry or adjudicated upon by the International Court of Justice.[5] The Soviet Union vetoed this proposal[6] and subsequently, on August 20, 1960, placed its complaints arising from the U-2 and the RB-47 incidents before the XVth session of the General Assembly.[7] But with the release by the Soviet Union of the two surviving airmen from the RB-47 after the Kennedy Administration had taken office in 1961,[8] it seems safe

[2] *The Times*, August 6, 1960. Actually the British Prime Minister had already said in a written reply in the House of Commons on July 26, 1960: "The aircraft's flight plan did not take it within fifty miles of Soviet territory at any point. We were ourselves able to determine the position of this aircraft, and we have reliable evidence to show that it did not go within thirty miles of the coast. Our information fully tallied with the United States estimate" (627 H.C.Deb. 5 s., *col. 111*). The same information was given a day before (July 25) by Sir Pierson Dixon in the Security Council (S/PV 881, p. 9, at p. 10).

[3] Soviet complaint of July 13, 1960 (S/4384; S/4385), considered on July 22 (S/PV 880), 25 (S/PV 881), 26 (S/PV 882, 883) and August 8, 1960 (S/PV 884).

[4] SC (XV) S/PV 883, p. 31.

[5] S/4409/Rev. 1, July 26, 1960.

[6] SC (XV) S/PV 883, p. 39 (July 26, 1960). Mr. Kuznetsov, the Soviet delegate, said: "The United States proposal can be interpreted only as an attempt to deprive the Soviet Union of its sovereign right to take whatever steps are necessary to ensure the inviolability of its frontiers, and to transfer the right to an international commission or to the International Court. It is legitimate to ask what self-respecting State would agree to so glaring an infringement of its sovereign rights."

[7] Doc. A/4446.

[8] "Russia Releases Survivors of RB-47," *The Times*, January 26, 1961.

to assume that both incidents are now closed.[9] It may even be a fair conjecture that the U-2 pilot might soon be released from prison and expelled by the Soviet Union in order not to present too obvious a contrast between these two incidents. The United States Government, on the other hand, appears anxious that these two cases be clearly distinguished one from the other. Thus, President Kennedy in his first telecast Press conference on January 25, 1961, when he announced the release by the Soviet Government of the two survivors from the RB-47, stressed that the Soviet Union was fully aware of the distinction drawn by the United States between the flights of the U-2 and the RB-47. He also stated that he had directed that flights *penetrating* Soviet airspace would not be resumed, a continuation of President Eisenhower's order in 1960.[10] By implication, it would appear that peripheral reconnaissance will still be carried out.

Be that as it may, it seems well established that if the RB-47 were over the high seas, even though it might have been engaged in reconnaissance, its destruction by the Soviet Union would be contrary to international law. Indeed, the legality of peripheral reconnaissance was implicitly acknowledged by both the British and the United States delegates to the United Nations, and not disputed by the Russians. Thus, Sir Pierson Dixon, during the debate on the RB-47 incident, said that the Security Council would have to be "in virtually permanent session" if Britain were to make an issue of every separate occasion when she was "overlooked, or overheard by the Soviet Union."[11] He mentioned in particular:

> "We in the United Kingdom have for a long time known that Russian reconnaissance aircraft carry out intelligence-gathering flights. . . . Similarly, we in the United Kingdom are frequently subjected to the annoyance of seeing Soviet trawlers, which we know are fitted up with electronic and technical equipment required to intercept radio transmissions in the United Kingdom, in close proximity to our own

[9] "Mr. Khrushchev on Forgetting the U-2," *The Times*, January 2, 1961, referring to Mr. Khrushchev's various New Year toasts.

[10] USIS, Off. Text, January 26, 1961, p. 2.

[11] SC (XV) S/PV 881, p. 9, at p. 13 (July 25, 1960).

> territorial waters, or in close proximity to areas where naval exercises or Western military research activity is carried out. . . . The same thing applies to the numerous unidentified submarines recently found lurking in the neighbourhood of United Kingdom naval exercises and, indeed, in suspicious circumstances which suggest that they are carrying out electronic intelligence operations within fifty miles of the coast of the United Kingdom." [12]

And, in his speech of July 26, Mr. Lodge, the United States delegate, with the aid of maps and photographs, pointed out:

> "[T]he Soviet Union has been sending these electronic reconnaissance planes regularly off the coast of Alaska, as close as five miles from our territory, to gather intelligence on our radars and other electronic signals. . . . The difference between the United States and the Soviet Union is that we shoot their aircraft with cameras; they shoot ours with guns and rockets and kill or imprison our crews." [13]

The pointed difference in the legality of penetrative reconnaissance and of peripheral reconnaissance leads us back to the fundamental importance of clearly delimiting the upper limits of national space, a problem deliberately eschewed by the United Nations *Ad Hoc* Committee on the ground that it is not essential to the continued peaceful use of outer space [14]; for reconnaissance by means of an artificial satellite is lawful if the latter's orbit lies outside the national space of the State spied on, but illegal if it penetrates within.

Demilitarisation and Disarmament

To turn from reconnaissance to the demilitarisation of outer space is to enter into the opaque, confused and frustrating history of

[12] *Ibid.* p. 12. *Cf.* also the United Kingdom Prime Minister's statement in the House of Commons on July 19 (627 H.C.Deb. 5 s., col. 257) and the Minister of Defence Mr. Watkinson's written answer to a question on the same subject on July 20 (*ibid. cols. 48–49*). Mr. Macmillan, in his statement on July 19, said: "These flights and these movements by sea are perfectly legal under international law," referring to reconnaissance activities of both sides (*ibid.* col. 259).

[13] SC (XV) S/PV 883, p. 30, at pp. 33–34, and Map 1 annexed thereto (July 26, 1960).

[14] See above, notes 67–74 and text thereto.

disarmament in the United Nations. So far, there is not a gleam of light on the horizon. The two poles are represented by the respective slogans of no disarmament without control and no control without disarmament.

In so far as the establishment of the *Ad Hoc* Committee on the Peaceful Uses of Outer Space [15] and of its successor [16] deserves to be so regarded, they are the only fruits that several years of efforts in this field have borne. The seeds were sown by a United States proposal to set up a technical committee to study the design of an inspection system for objects entering into space, put forward in 1957.[17] Pollination came from a Soviet counter-proposal presented first in March 1958 [18] and subsequently in November 1958 to the General Assembly.[19] But up to now the twenty-four-Power Committee has made little headway.

As regards the ban of military activities in outer space, again the United States succeeded in being the first to have introduced such a proposal before the Political Committee of the General Assembly on January 14, 1957.[20] The Soviet counter-proposal [21] was limited initially to the ban of rockets suitable for use as nuclear weapons, but it was subsequently broadened to include the military use of outer space in general.[22]

15 See above, text to note 56 *et seq.*
16 See above, text to note 61.
17 See above, notes 53–54.
18 See above, note 55.
19 A/C.1/L.219/Rev. 1 (November 18, 1958), Soviet proposal to establish an international committee for co-operation in the study of cosmic space for peaceful purposes of eleven members (U.S.S.R., U.S.A., U.K., France, India, Czechoslovakia, Poland, Roumania, U.A.R., Sweden, Argentina).
20 *Loc. cit.* in note 53, above: "Renewed negotiations should strive towards the following objectives . . . fourthly, to ensure that research and development activities concerning the propulsion of objects through outer space would be devoted exclusively to scientific and peaceful purposes"; see also *ibid.* para. 13 (p. 42).
21 See U.K., *Report on the Proceedings of the Sub-Committee of the United Nations Disarmament Commission, London, March 18–September 6, 1957*, Cmnd. 333 (1957), Appendix I, DC/112: Fourth Report of the Sub-Committee of the Disarmament Commission (August 1, 1957), Annex 1, DC/SC.1/49: Soviet Proposal on the Reduction of Armaments and Armed Forces and the Prohibition of Atomic and Hydrogen Weapons (March 18, 1957), p. 25 *et seq.* At this stage, the Soviet Union apparently held the view that it was the nuclear warhead that mattered and not the missiles or rockets themselves (see *ibid.* p. 10). The date March 18, 1956, given on p. 25 as that of the Soviet proposal is an obvious misprint (see p. 23 where the date of Doc. DC/SC.1/49 is given as March 18, 1957; *cf.* also *ibid.* p. 6, para. 4).
22 See above, note 55. See also Soviet draft resolution before the First Committee of the General Assembly, A/C.1/L.219 (November 7, 1958); this part of the Soviet proposal was subsequently dropped in favour of A/C.1/L.219/Rev. 1 (November 18, 1958), *q.v.* above, note 19.

However, other obstacles stand between the Soviet *bloc* and the Western Powers. Both sides usually present their schemes as part of a "package proposal," and each then recriminates against the other for picking and choosing from the "package" those items which it finds attractive without agreeing to their accompanying conditions. Thus, the Western proposals always stress control and inspection which the Russians regard as nothing more than "legitimised espionage." The Russians, in turn, always link their disarmament proposals with the question of "foreign bases" which the Western Powers consider as red herrings.

Perhaps in a flush of success immediately after the launching of SPUTNIK I, Mr. Khrushchev was reported to have expressed Soviet willingness to discuss directly with the United States the problem of space control independently of general disarmament, provided that agreement could be reached on "peaceful co-existence." [23] Secretary of State Dulles almost simultaneously made an announcement expressing willingness to separate space control from general disarmament, on condition that the "associates" of the United States agreed,[24] and the Political Committee of the General Assembly was so informed.[25] But in the subsequent official version of the Soviet proposal the word "disarmament" appeared instead of "peaceful co-existence." [26]

Another snag is the not unnatural dislike of the Soviet Union of finding itself in a numerical minority in the United Nations. It prefers, therefore, either a direct approach between the two hegemonial Powers, itself and the United States, as its October 1957 proposals show,[27] or a tripartite arrangement consisting of the

[23] The proposal was made in the course of an interview in Moscow with Mr. James Reston, the chief Washington correspondent of the *New York Times* (*The Times*, October 9, 1957); see also *ibid.* October 12, 1957.

[24] *The Times*, October 9, 1957.

[25] Mr. Lodge, United States delegate, GA (XII) A/C.1/SR 866, p. 5, at p. 7: "The four Powers proposed that a technical committee should be established to work out an inspection system which would ensure the use of outer space exclusively for peaceful purposes. If there was general agreement to conduct such a study on a multilateral basis, the United States was prepared to participate without awaiting the conclusion of negotiations on the other substantive proposals" (October 10, 1957).

[26] "Unhelpful Attitude of Russians," *The Times*, October 12, 1957.

[27] See above, note 23. A State Department statement issued on October 8, 1957, referred to Mr. Khrushchev's proposal for a direct United States-Soviet study of the control of objects entering outer space and after recalling the Western proposal

Soviet *bloc*, the Western *bloc* and the "neutrals." Failure to accept the Soviet tripartite concept in the formation of the *Ad Hoc* Committee on the Peaceful Uses of Outer Space resulted in the Soviet *bloc* boycotting it.[28] The Soviet Union had wanted an eleven-member Committee consisting of four Western Powers, four Soviet-*bloc* countries and three "neutrals."[29] The ratio in the eighteen-nation *Ad Hoc* Committee that was established was: 13:3:2.[30] In the composition of the twenty-four-nation Committee,[31] which was created as a result of a resolution sponsored jointly by the Soviet Union and the United States,[32] it has been reported that the ratio of 12:7:5 involved in fact an acceptance of Soviet terms by the Western Powers. This was perhaps for the sake of securing that the new creation should be born in wedlock between East and West, for they had originally proposed the ratio of 12:5:7 and were not prepared to go beyond 12:6:6.[33] Unfortunately for the child, this *mariage de convenance* did not last and it is suffering from the usual consequences of parted parents: neglect and abandonment.

In principle, the United States has consistently rejected the "two sides" concept. During the discussion leading to the formation of the *Ad Hoc* Committee, the United States delegate to the United Nations said:

> "There are no 'two sides' to outer space. There are not—and never have been—'two sides' in the United Nations. . . . We do not . . . accept the idea of 'two sides'—and, frankly, we don't understand it."[34]

of August 29 (see above, note 54), pointed out that what was proposed was a "multilateral international study and not a bilateral study between the United States and the U.S.S.R. and that the United States would not be disposed to consider any alteration of this aspect of the proposals" (*The Times*, October 8, 1957). See also reply from Soviet Embassy to United States Congressman Victor Anfuso of January 5, 1960 (*Flight*, January 15, 1960, pp. 67–68).

28 See above, note 58.

29 See above, note 19.

30 Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, U.S.S.R., U.A.R., U.K. and U.S.A.

31 Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Czechoslovakia, France, Hungary, India, Iran, Italy, Japan, Lebanon, Mexico, Poland, Roumania, Sweden, U.S.S.R., U.A.R., U.K. and U.S.A.

32 See above, note 61.

33 *Cf.* "Soviet Wins Point in UN Space Talk," *New York Times*, December 9, 1959, p. 184.

34 Mr. Lodge, United States delegate, during the debate on the establishment of the *Ad Hoc* Committee, November 24, 1958, USIS, Off.Text, November 25, 1958, p. 2; the account in GA (XIII), A/C.1/SR 994, p. 235, is slightly abridged.

The Soviet "two sides" concept and struggle for parity scored a point, however, when the Conference of Foreign Ministers, shortly before the XIVth session of the General Assembly in 1959, recommended the formation of a ten-nation committee on disarmament to replace the previous five-Power Sub-Committee. Whereas the latter was composed of the Soviet Union in the midst of four Western Powers (Canada, France, United Kingdom, United States), the ten-nation Disarmament Committee is based on equality between the "two sides": five NATO Powers on one side (Canada, France, Italy, United Kingdom, United States) and five Warsaw-Pact countries on the other (Bulgaria, Czechoslovakia, Poland, Roumania and the Soviet Union).[35]

The meeting of this Committee began on March 15, 1960, and on April 1 the United States Chief of Delegation, Mr. F. Eaton, proposed that the United States and the Soviet Union—the only two Powers with space capabilities—should agree on the banning of space weapons and accept a system of control as a pilot scheme for more ambitious projects at some future date.[36] The Soviet Union alleged, however, that this proposal was aimed at control without disarmament. The Committee adjourned on April 20 and reconvened on June 7. On June 27, the five Warsaw-Pact Powers, accusing the Western Powers of insincerity, withdrew from the Committee.[37] On the same day, the Soviet Union requested the inclusion in the agenda of the XVth session of the General Assembly of an item on disarmament.[38]

Meanwhile, the eighty-two-member Disarmament Commission, which had not met since September 10, 1959, was convened on August 16, 1960, and on August 18 unanimously recommended to the General Assembly that the ten-nation Disarmament Committee

[35] The Ten-Power Disarmament Committee owes its origin to an agreement reached between the Foreign Ministers of France, United Kingdom, United States and the U.S.S.R. during a conference held in Geneva in August 1959 (see Misc. No. 14 (1959), Cmnd. 868). In consequence of this statement, the four governments made a joint statement on September 7, 1959, about the establishment of this Committee (see U.K., *Verbatim Reports of the Ten-Power Disarmament Committee, March 15–April 29, 1960, and June 7–June 27, 1960*, Cmnd. 1152 (1960)).

[36] TNCD/PV 14, Cmnd. 1152 (1960), p. 267, at p. 270.

[37] TNCD/PV 47 (June 27, 1960), Cmnd. 1152 (1960), p. 879 *et seq.*

[38] A/4385 (June 27, 1960) and Corr. 1 (June 29, 1960).

should "continue in being and be convened whenever deemed necessary."[39] After having considered the Report of the Commission, the General Assembly adopted three resolutions which were all related to nuclear weapons. The first 1176 (XV), adopted on December 27, 1960, aimed at preventing further dissemination of nuclear weapons. The other two, 1177 (XV) and 1178 (XV), adopted respectively on December 27 and 28, 1960, were concerned with the suspension of nuclear tests.[40]

This leads us to the latest and perhaps the most important proposal that has yet been made in the United Nations regarding outer space, namely, that made by President Eisenhower before the General Assembly on September 22, 1960. After recalling the recent example of the Antarctica Treaty of 1959[41] and the missed opportunity of 1946 when the Soviet Union turned down the United States Atoms for Peace Plan for placing atomic energy under international control,[42] President Eisenhower proposed:

> "1. We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty.
>
> "2. We agree that the nations of the world shall not engage in warlike activities on these bodies.
>
> "3. We agree, subject to appropriate verification, that no nation will put into orbit or station in outer space weapons of mass destruction. All launchings of space craft should be verified in advance by the United Nations.
>
> "4. We press forward with a programme of international co-operation for constructive peaceful uses of outer space under the United Nations. . . ."[43]

[39] August 16 (DC/PV 66), 17 (DC/PV 67, 68), 18 (DC/PV 69, 70), 1960; resolution of August 18 (DC/182/Corr. 1); Report to General Assembly of August 26, 1960 (A/4463), referred on October 10, 1960, to First Committee which reported to the General Assembly on December 20, 1960 (A/4680).

[40] A/RES/1576, 1577 and 1578 (XV).

[41] December 1, 1959, Cmnd. 913 (1959); *cf.* also P. C. Jessup and H. J. Taubenfeld, *Controls for Outer Space and the Antarctic Analogy* (1959).

[42] Presented by United States delegate, Mr. Bernard M. Baruch (thus also known as the Baruch Plan), at the first meeting of the UN Atomic Energy Commission, June 14, 1946, Off.Rec., 1st Year, 1st Meeting, No. 1, p. 4, at p. 7 *et seq.*

[43] USIS, Off.Text, September 22, 1960, pp. 5–6. The Official Records of the General Assembly, GA (XV) A/PV 868 (September 22, 1960), p. 45, at p. 48, list the second sentence of item 3 as a separate item 4 (para. 58), while removing what appears in the text as item 4 to para. 59, thus not forming part of the

There are some unexplained features in these proposals. For instance, why limit the ban of territorial claims and warlike activities to extra-terrestrial bodies and not extend it to outer space in general? Moreover, does it mean that the proposed restriction on the launching of spacecraft applies (a) to only weapons of mass destruction, but not other types of weapon, and (b) to putting such weapons into orbit or station in outer space, but not to these and other weapons aimed directly at another State?

Furthermore, too much stress must not be placed on the Antarctica analogy and the so-called missed opportunity of the Atoms for Peace Plan. In so far as the 1959 Antarctica Treaty is concerned, it is only realistic to think that agreement proved feasible only when success in rocketry considerably downgraded that continent's strategic value, so that it is not altogether a valid precedent for outer space, at least for the present. As for the Atoms for Peace Plan, one needs only to reflect on the failure of the Western Powers to prevent France from building and testing what have sometimes been unkindly called antiquated atomic bombs in order to realise that, even with all the hindsight and experience of the last fourteen years, the chance of the Plan being accepted in 1947 seems today no better than it was then. Indeed, if the Soviet Union had accepted the Plan in 1947, what would be the odds of its having by now reached parity with the United States in the know-how of thermonuclear weapons?

Yet, notwithstanding these observations and reservations, the Eisenhower proposal represents the most far-reaching that has been made by either side up to date in relation to outer space. Moreover, bearing in mind that there is now approximate parity between the East and West in space technology, as compared with the absence

actual proposals. The USIS text appears to make better sense and both USIS, London, and the Department of State, Washington, D.C. (letter to the writer from Mr. John N. Washburn, Acting Assistant Legal Adviser, dated April 6, 1961), insist that it is to be taken as correct. On the other hand, the United Nations Chief of the Official Records Editing Section says: "I have checked with the sound track . . . and have ascertained that the text printed by us corresponds exactly to what the speaker said . . ." (relayed to the writer by letter from the UN Information Centre, London, dated March 17, 1961). It would seem, therefore, that there was a *lapsus linguae* in the actual delivery of the speech which the United States delegation to the UN failed to correct in the provisional records.

of nuclear parity in 1947, there is strength in the remarks prefacing the Eisenhower proposal:

> "National vested interests have not yet been developed in space or in celestial bodies. Barriers to agreement are now lower than they will ever be again. The opportunity may be fleeting. Before many years have passed, the point of no return may be behind us. . . . We must not lose the chance we still have to control the future of outer space." [44]

It matters little whether this or any other proposal is eventually adopted by the United Nations. The fact remains that outer space offers mankind in general, the United Nations in particular, and the space Powers specifically, not only a technological, but also a commensurate political and moral challenge. For unless we succeed in composing our differences, we shall not have peace on earth or in space, without which we will go on facing the constant danger of a cosmic war that threatens to wipe mankind off the surface of the earth.

[44] GA (XV) A/PV 868, p. 45, at pp. 47–48 (paras. 56 and 58).

APARTHEID AND THE SOUTH AFRICAN COURTS

M. A. Millner

> "If judges are to kill this thing they love, let them do it, not like cowards with a kiss, but like brave men with a sword." [1]

The doctrine of racial exclusiveness known as apartheid, which is at the moment triumphant in South Africa, presents the grave social and political problems with which the world has grown familiar. Inevitably the rising tensions from time to time engulf the court as well. Driven out of the cosy refuge of "lawyers' law," the judges are forced to examine the very roots of the legal order and the nature of their own functions. In the agonised search for judgment, the nature of law and justice, the role of the judges, the limits of legislative powers—these and other abiding questions escape from the classroom and take their place at the bar of the court.

The Caste Society

The social separation of Black and White is a very marked feature of South African life, founded on history, law and social convention. Nevertheless, "apartheid" (separateness) does not aptly describe the factual situation in the Union of South Africa. The non-Whites constitute the great majority of the population, and notwithstanding the reservation of certain areas for their exclusive occupation,[2] for which the Government has coined delicately evocative phrases like "the Bantu homelands" or "the Bantu heartlands," the course of history up to now has tended less towards

[1] Judge Learned Hand, "The Contribution of an Independent Judiciary to Civilisation"—see *Jurisprudence in Action* (1953), p. 234.

[2] Amounting, at the end of 1958, to 11·9 per cent. of the total area of the Union.

separateness from the Whites than towards the reverse. Economic forces have relentlessly drawn the various groups closer together, creating a massive urbanised African population, steadily more detribalised, more settled and more conscious of its aspirations and deprivations.

In the sense, therefore, of their geographical dispersal through the land, and in the sense of their economic involvement in the life of the country, the integration of the African people and of other non-White people into the national life is far advanced. In these matters, therefore, "apartheid" describes not so much a state of fact as a political objective or ideal which is concerned with the maintenance and further extension of the existing separation of the racial groups without the foreseeable surrender of European political and economic hegemony. The legal measures enacted to accomplish this purpose constitute a massive body of statute law and regulations designed to achieve physical segregation in every department of life, excepting only the necessary propinquity of master and servant, and to create inviolable preserves of power and privilege for the white aristocracy.

The elaborate rationalisation of the apartheid theory by its supporters and the high advantages which it is said to hold for the future of all sections [3] are matters which need not here detain us. Apologetics for the present state of the apartheid society and assurances about the future do not unwrite the racial laws with which the Statute Book abounds, nor mitigate the rigour of the present administrative régime. And certainly the present fruits of apartheid is a great proliferation of discriminatory laws which, on the one hand, press heavily on the non-White population and, on the other hand, preserve an immeasurably favourable status for the white community. The goal or mirage of the independent autonomous African communities lies in the unspecified future. Meanwhile, all the powers of the State are bent to the task of regulating the contact between the two groups.[4] The resultant conspiracy of

[3] *Cf.* Gwendolen M. Carter, *The Politics of Inequality* (1958), p. 76: "The high rectitude of Nationalist theorising."

[4] "Two groups" conveniently expresses the major division into "White" and "non-White." The basic division is, however, fourfold: (i) White or "European"; (ii) African or "Native" or "Bantu"; (iii) Coloured, *i.e.*, of mixed

law and social convention striving to frustrate the growth of a single community produces in South Africa a caste society horizontally arranged in impermeable layers. There are four bands in the colour spectrum, to each of which there corresponds a scheme of rights and privileges, liabilities and disabilities so graded that at the apex stand the white or European aristocrats and at the broad base the African multitude, living in a region of minimal rights and maximised disabilities.

If we may look upon a caste as a group of persons, determined by reference to birth or racial origin, sharing a common legal status, we find in South Africa a legal order in which the status factor is overwhelmingly dominant. Thus South Africa exhibits the reverse of the movement from status to contract which Sir Henry Maine discerned as the dynamic principle of progressive societies up to his own time.[5] The social order which Maine had in mind consecrated the self-determination of the individual, which it equated with the greater good of society. Self-determination is incompatible with status, which is State-determination or law-determination. A man may not contract out of his caste nor (generally speaking) transcend by his own act of volition the liabilities and disabilities which cohere in it by law. Apartheid legislation ossifies in terms of colour and caste those social relationships of domination and subjection which elsewhere are expressed in terms of neutral legal concepts whose social and economic function is fluid and whose operation is not legally correlated to a colour or race factor.

The range of human interests and activities which are removed from the domain of self-determination and subjected to the caste-status factor constantly expands, embracing basic rights of public and private law such as the franchise, freedom of movement and

ancestry; (iv) Indian or Asiatic. Statutory definitions are not at all uniform. The Population Registration Act, No. 30 of 1950, designed to classify the entire population into racial groups once and for all, provides for the sub-classification of Coloured and Africans. The Coloured have since been grouped into Cape Coloured, Cape Malay, Griqua, Chinese, Indian, other Asiatic, and other Coloured—Proclamation 46, *Government Gazette* No. 6191 of 1959. The Africans are divided into eight "separate national units" (North-Sotho, South-Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa, Zulu) by the Promotion of Bantu Self-government Act, 1959, s. 2. Clearly a rich field of ethnic sub-classification lies ahead. For the human consequences of this process, see *Race Classification in South Africa—Its Effect on Human Beings*, by Muriel Horrell (1958).

[5] Maine, *Ancient Law* (1930), Chap. V.

residence, of assembly and discussion, the possession and enjoyment of property, the contract of service, industrial organisation, the employment of skills or talents, the selection of a partner in marriage, the education of the young, the care of the aged, sick and the handicapped and generally the measure of participation in social benefits.

The existence and enforcement of this complex network of restrictive laws of a discriminatory character build up social pressures of an explosive nature, such as those which erupted in March 1960 at Sharpeville in the Transvaal. It is not sought here to catalogue or detail the laws which express this policy,[6] but rather to examine some of the great questions of law with which the existence and enforcement of such laws confront the courts.

The antecedents of this discriminatory legislation precede the formation of the Union and are to be found in all four of the pre-Union colonies, but especially in the Transvaal, where the inequality of the races was apotheosised in a solemn article of the Constitution.[7] It is hardly surprising that, descended from such ancestry, the Act of Union should, in the political field, itself embody the principle of White domination in its franchise provisions[8]; for the Union of South Africa, the taint of apartheid is congenital.[9] Discriminatory laws flowed onto the Statute Book from the beginning, sporadically at first, then more deliberately and finally, upon the accession to power of the present Government, with a coherence and momentum unparalleled in the earlier phase. Philosophical and theological arguments were now advanced to bolster the legal structure of race discrimination[10] and the colour bar laws, hitherto incomplete, uneven and loosely co-ordinated, were now to be

6 K. L. Roskam, *Apartheid and Discrimination* (1960), p. 55, lists the main ones.

7 "The people will permit no equality of Coloured with White inhabitants either in Church or State" (Grondwet (Constitution) of the South African Republic, 1858, Art. 9).

8 The South Africa Act, 1909 (9 Edw. 7, c. 9), s. 35 (1), maintained the existing inequalities. Its "entrenchment" of the non-racial franchise in the Cape of Good Hope was to prove illusory (see below under sub-heading: The Constitutional Crisis).

9 See K. L. Roskam, *op. cit.*, note 6, above; *cf.* Brookes and Macaulay, *Civil Liberty in South Africa* (1958), Chap. IV.

10 Especially in the publications of SABRA (the South African Bureau of Racial Affairs) formed in 1949.

systematically revised and extended into a comprehensive caste system.

Given this intensity, the policy of apartheid became, and remains, a forcing house of penal laws and administrative powers, the brunt of which is borne by the non-European population. It is in this context that the role and attitude of the South African Supreme Court in the administration of justice to the people of South Africa are to be assessed.

Influenced alike by the English tradition, which, through the medium of the Supreme Court of the Cape Colony in the nineteenth century, permeated the judiciary, and by the equitable spirit of the Roman-Dutch law, the South African common law shows a strong bias in favour of civil rights and has no room for inequalities grounded on racial differences. Certainly the foundation members of the Union's highest court, the Appellate Division of the Supreme Court, and, until recent times, most of their successors, were men dedicated to the ideals of the majestic impartiality of courts of justice and the equality of all men before the law. Unfortunately, there was a fatal dualism in their conception of equality which they could neither transcend nor even perhaps recognise in themselves. The idea of equality before the law comes nearest to realisation in a homogeneous community in which differences of status are minimal. There is then the least conflict between ideal notions of equality and their realisation in rules of law and application in courts of justice. But in a social order split by caste divisions, equality before the law cannot mean equality of all men, but only equality of all men of the same caste, that which Aristotle described as the equality of equals; for there is no equality of master and slave in the law of Rome, nor of lord and serf in the law of feudal England; no more is there equality before the law of White and Black in the caste system of South Africa.

The Major Premise

The vast disparities in social, economic and political privilege which exist in such a society have a profound effect on the minds of those who dwell in it. The constant correlation of wealth, privilege,

prestige, power, education and refinement, with a white skin imposes itself upon the mind as something natural, inevitable, even pre-ordained. Barriers of language and culture reinforce the sense of superiority and mutual identification of the dominant white group as against the inferiority and alienness of the non-Whites.

The roots of these race attitudes and colour prejudices can be traced back to the frontier society of the eighteenth and nineteenth centuries, when the survival of that society may very well have been dependent upon the existence of such attitudes. For the frontier farmer, the "trek boer," any notion of equality between himself and the heathen was unthinkable. "The idea that Christians and non-Christians were, in any sense equal, even before the law, or that an offence by a Christian against the person or property of a non-Christian should be taken as seriously or dealt with as vigorously as a similar offence by a non-Christian, was entirely foreign to frontier mentality." [11] The existence of such group attitudes served and continues to serve powerful functions of a psychological and economic nature for the dominant group. In the result there emerges in the mind of the white man not the individual African but a stereotype formed in his mind:

> "The White sees a member of that race, not as an individual personality like himself, but as a representative of an alien group, whose most striking characteristics are an inferiority in intelligence and knowledge, an inferiority in standards of living and occupation, a tendency towards violent and criminal practices, a behaviour which is childish and often ridiculous, in short the opposite of all those qualities which form the image which the white man has in mind when he thinks of his own group. In spite of the numerous exceptions in both races, it is these images or concrete ideas strongly charged with emotion which determine the attitude of the white man both to members of his own group as well as to members of the alien group." [12]

[11] I. D. MacCrone, *Race Attitudes in South Africa* (1957), p. 127; *cf.* "The intense and exclusive group consciousness of the frontier found expression in a consciousness of race and social supremacy which coincided almost uniformly with the distinctions based upon creed and colour" (*ibid.* p. 130).

[12] *Ibid.* p. 263.

Thus a social order which is dominated by caste relations corresponding to a hierarchy of privilege generates in the dominant caste powerful sentiments of social, moral and intellectual superiority. Linked as they are with rooted fears and prejudices, these deeply embedded convictions of human inequality saturate the mind and corrupt the judgment. Here, indeed, is a striking example of the inarticulate major premise which Holmes perceived in the judicial process. Incorruptible though it is, and dispassionate though it may strive to be, the judiciary cannot finally escape the web of feeling, the wordless sentiments which shape its own innermost thought; and where the issues touch these springs of thought, only the most resolute independence of mind, the most singular capacity for objectivity and detachment can hope to rise above it.

In so unfavourable a mental climate, the ideal notion of human equality, where it survives at all, lives on sufferance and in continual tension with the image implanted in the mind by history, tradition and immense privilege. It would be remarkable if, in such a situation, the crystalline sensibility of the white judge were not to split along the lines of cleavage of the caste society, responding only coarsely to the claims of the non-White to a richer, more ample concept of his personality. Pressing upon the South African judge is the whole weight of this powerful social heritage, based in some ways upon factors which have ceased to have relevance in his own age, yet retaining a relentless grip upon his mind and sentiments.

Approaching the matter from another point of view, we find in South Africa a strange ambivalence of values. A rigorous caste society pervaded by inequality and differentiation in fact and in sentiment, yet she is heir to traditions and institutions of government sprung from English political democracy basically out of accord with the social realities of South African life. Judicial thinking takes place in this matrix of incompatible elements, ever swayed by the striving of the law towards normative or formal equality, yet unable to challenge the fundamental inequality of the caste society itself. The inequality, indeed, is mirrored by the composition of the court itself. Although there is no constitutional

barrier,[13] none but a white man has ever been appointed a judge, so that, independently of legal and constitutional limitations, the courts are oriented by their own racial exclusiveness towards a fundamental acquiescence in the discriminatory character of the Union's laws. Their attack on these laws is necessarily qualified and peripheral.

The "Separate but Equal" Doctrine

Within the confined area which the courts regard as their proper sphere, the conduct and pretensions of the executive is the main field of combat. Within the limits which we have been examining, the tradition and outlook of South African judges, coupled to their independence of status, has in the past made the Supreme Court an important obstacle to executive arbitrariness in matters involving discriminatory laws. They have sought ceaselessly to limit the scope of such laws and to force their administration into some conformity with judicially accepted and established concepts of "natural justice."

The apartheid policy, requiring, as it does, ceaseless regimentation, control, direction and petty-law enforcement, produces a multitude of statutory regulations and a grossly swollen administrative machine. The immediate impact of apartheid laws is felt by the African people in the form of police and administrative action taken in pursuance of such statutory rules. Hardly an aspect of their life is exempt from regulation in some form, and administrative power is correspondingly inflated and far-reaching. Indeed, the Native Administration Act of 1927 conferred upon the Governor-General powers of legislation so wide as to verge on the total surrender by Parliament of its normal legislative functions.[14]

The primary doctrinal limit of judicial interference is, of course, the theory of parliamentary sovereignty, which places all Acts of Parliament which conform with the Constitution out of reach of

[13] The South Africa Act, 1909, s. 100, merely provided that judges should be appointed by the Governor-General in Council. This provision has passed into the new governing statute, the Supreme Court Act, No. 59 of 1959, which adds the proviso that they shall be "fit and proper persons."

[14] Act No. 38 of 1927, s. 25; and see Hahlo and Kahn, *The Union of South Africa* (1960), p. 799.

direct judicial challenge. To this question we shall revert. But subordinate legislation is not thus protected, so that, faced by oppressive or unjust legislation by subordinate bodies, the courts have the *ultra vires* doctrine at their disposal. This device is, in truth, a limited exercise of judicial review through the interpretative functions of the court, the power to say what a statute means and what it does not mean, what it permits and what it forbids.[15] Without benefit of a Bill of Rights constitutionally entrenched, or a scheme of irrefragable superior principles sanctioned by some higher law, the limits of the *vires* rule must be narrow indeed. To favour the liberty of the subject, yet to do no violence to a legislative intent which is often plainly designed to curtail that liberty, is a delicate exercise in statutory interpretation. Yet in South Africa its effect in obstructing apartheid policy has been far from inconsiderable.[16]

Statutory regulations which discriminate between races illustrate the problem pointedly. They pose the initial question whether discrimination as such is valid. The enabling Act may, of course, leave no room for doubt. Thus in statutes directly concerned to implement apartheid, the legislative intention is explicit: differentiation is the very purpose of the law.[17] But there remains a class of enactment which is non-specific, neutral in relation to colour questions. What then is to be said of regulations made thereunder which differentiate between races, requiring, for example, separate counters for White and non-White in post offices or separate compartments in trains? In this connection Lord Russell's judgment in *Kruse* v. *Johnson*,[18] bearing on the validity of by-laws, has acquired great importance in South Africa: his lordship there said:

> "If for instance they were found to be partial and unequal in their operation as between classes the court might well say

[15] See McWhinney, *Judicial Review in the English Speaking World* (1956).
[16] *Cf. ibid.* p. 15, note 24.
[17] *e.g.*, the Native Land Act, No. 27 of 1913; the Natives (Urban Areas) Consolidation Act, No. 25 of 1945; the Group Areas Act, No. 41 of 1950; the Population Registration Act, No. 30 of 1950; and countless others.
[18] [1898] 2 Q.B. 91, at p. 99. The test is adopted by the Appellate Division; see *Minister of Posts and Telegraphs* v. *Rasool*, 1934 A.D. 167; *R.* v. *Abdurahman*, 1950 (3) S.A. 136 (A.D.), at p. 143.

> 'it was never intended to give authority to make such rules; they are unreasonable and *ultra vires*. . . .'"

Reasonableness is thus used as a test of legislative intention, the supposition being that the legislature could not have intended anything so unreasonable as inequality between the races.[19]

Lord Russell spoke, of course, with reference to English conditions. In South Africa, partiality and inequality as between races are so much a commonplace that the court "might well say" exactly the opposite of Lord Russell's supposition. No South African court could conceivably utter the words spoken by Warren C.J. in the United States Supreme Court:

> "Classifications based solely upon race must be scrutinised with particular care, since they are contrary to our traditions and hence constitutionally suspect." [20–21]

Nothing would seem more reasonable than discrimination to the South African legislature, since class (in the sense of race) inequality is institutionalised and a vast body of statute law is precisely concerned to create or give legal backing to discrimination on racial grounds. It is therefore evident that there is a heavy element of fiction in a finding such as this:

> "It is unlikely that the legislature intends that users of the railways should, according to their race, have partial or unequal treatment meted out to them." [22]

Nevertheless, the courts have consistently maintained that, without clear authority granted in the enabling statute, discriminatory regulations importing inequality of treatment were unreasonable.[23]

[19] Unreasonableness, in this connection, means that Parliament did not intend to give authority to make such a regulation: *R.* v. *Abdurahman*, 1950 (3) S.A. 136 (A.D.), at p. 150; *R.* v. *Lusu*, 1953 (2) S.A. 484 (A.D.), at p. 489. Lord Russell's test has therefore been made to embrace not only by-laws, but all subordinate legislation.

[20–21] *Bolling* v. *Sharpe* (1954) 347 U.S. 497.

[22] *R.* v. *Abdurahman*, 1950 (3) S.A. 136 (A.D.), *per* Centlivres C.J. at p. 147. McWhinney takes the point, but cautiously: *Judicial Review in the English Speaking World* (1956), p. 119.

[23] See *R.* v. *Hildick Smith*, 1924 T.P.D. 69. Thus, *R.* v. *Abdurahman*, 1950 (3) S.A. 136 (A.D.), at p. 145: "It is the duty of the courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of an authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community. . . ."

On the other hand, separate provision *as such* is not held to be *ultra vires* so long as it is capable of being applied equally to all races. In short, subject to the absence of substantial inequality or partiality, differentiation by race is upheld in Union courts.

This position of " discrimination coupled with equality " represents the median view of the Appellate Division in the decisive case of *Minister of Posts and Telegraphs* v. *Rasool*.[24] It is, however, the polarisation of judicial opinion in the contrasting judgments of Beyers J.A. and Gardiner J.A. which is most revealing. Beyers J.A., frankly rejecting the unqualified assertion that all are equal in the eyes of the law, stood for a formulation of the law which should accord with the historical and contemporary reality of colour discrimination in South African life. Gardiner J.A., on the other hand, believing that all classification along colour lines was humiliating and an impairment of the *dignitas* of the person affected (the more so because of the existing distinctions of status between the different races), considered that racial distinction *per se*, apart from inequality of treatment, should be treated as invalid. The intermediate view which prevailed, namely, the doctrine of " discrimination coupled with equality," rests, of course, upon the unspoken assumption that the provision of facilities which, though separate, are substantially equal, is equality of treatment, and therefore just, and hence that the intention to permit separate but equal facilities may be reasonably imputed to the legislature.

This was in essence the position adopted by the United States Supreme Court in *Plessy* v. *Ferguson* in 1896,[25] in which it was held that " separate but equal " transport facilities accorded with the requirement of " equal protection of the laws " contained in the Fourteenth Amendment. Of course, the United States Supreme Court has now gone beyond that doctrine, holding that " separate educational facilities are inherently unequal " [26] and constitute a denial of due process of law.[27] These decisions are confined, in

[24] 1934 A.D. 167: " A discrimination (coupled with equality) on grounds of race or colour may or may not be unreasonable but in my opinion it cannot be held to be unreasonable *per se* on the mere grounds of being made on lines of race or colour ": *per* de Villiers J.A. at p. 182. See also *R.* v. *Abdurahman*, 1950 (3) S.A. 136 (A.D.), at p. 148.

[25] (1896) 163 U.S. 537.

[26] *Brown* v. *Board of Education of Topeka* (1954) 347 U.S. 483.

[27] *Bolling* v. *Sharpe* (1954) 347 U.S. 497.

terms, to educational facilities, but no one doubts the wider significance of their reasoning. As a matter of practice in South Africa, " separate but equal " facilities are hardly ever even remotely equal; but even if they were, their inequality would remain, if only for the intangible psychological reasons adverted to with reference to the negro children in *Brown's* case,[28] namely, the " generation in them of a feeling of inferiority as to their status in the community that may affect their health and minds in a way unlikely to be undone."

It is not adverse precedent alone that stands in the way of the adoption by the South African Supreme Court of so civilised and refined a concept of equality between races. In *Rasool's* case [29] the Appellate Division specifically rejected the argument which underlies the American decisions.[30] Nevertheless, even the " separate but equal " doctrine, now discarded as antiquated in the United States, stands in South Africa in advance of the *mores* of the white community, which accepts inequality as normal. The South African courts have reached here a compromise which marks the present limit of their capacity to transcend the established attitudes of the dominant caste. But, within the present framework of South African life, even formal equality of treatment proves to be unacceptable. It is not surprising, therefore, that the decision invalidating inequality of treatment on the railways [31] was received by the Government with dismay and hastily nullified by legislation which put the legality of separate but *unequal* treatment beyond question.[32] And indeed it seems that not even the long-established current of judicial authority is sufficient to exclude disturbing reflections of the legislature's policies from the courts of law. In a recent case [33] the Crown based an attack on the validity of a by-law on the ground that it was " repugnant to the general principles of our law " because it did *not* discriminate on the basis of colour! That this impudent argument could be advanced by counsel and solemnly treated by the court (which rejected it) affords its own commentary.

[28] *Brown* v. *Board of Education of Topeka*, note 26, above.
[29] *Minister of Posts and Telegraphs* v. *Rasool*, 1934 A.D. 167.
[30] See K. L. Roskam, *Apartheid and Discrimination* (1960), p. 77.
[31] *R.* v. *Lusu*, 1953 (2) S.A. 484 (A.D.).
[32] Reservation of Separate Amenities Act, No. 49 of 1953.
[33] *R.* v. *Kisten*, 1959 (1) S.A. 105 (N).

Audi Alteram Partem

In South Africa the claim of the citizen to relief from administrative arbitrariness is strongly associated with apartheid laws. The measure of judicial control here follows the English pattern. No separate tribunals and no *droit administratif* exist to shield the citizen from abuse of executive power. The task of doing so falls upon the ordinary courts, whose armoury for this purpose is pitifully slender.

The *ultra vires* doctrine will, of course, upset administrative acts and decisions in matters which are clearly outside the competence of the officer concerned. But the singular weakness of this kind of judicial control is the extreme narrowness of its range, its refusal to examine the merits. In the result, all that passes in review is the procedural regularity of the administrative act or decision in question. Even if the decision is felt (by the court) to be inequitable or wrong, a simple formula such as "whenever the Minister is satisfied . . ." or "deems" or "is of opinion" may effectively exclude all judicial consideration of the facts and grounds for his opinion.[34]

> "The only question of fact with which the court is concerned is whether the Minister *was* satisfied."[35]

There is, it is true, one class of administrative proceeding—the class styled "quasi-judicial"—which must submit to a further test. In this case, again following English example, the South African courts demand conformity with those minimum requirements of fairness which are dictated by "natural justice." The ambit of this doctrine is, of course, still only procedural, relating not to the substance of administrative act or decision but to the manner of its exercise. For all that, the doctrine enjoys a measure of elasticity arising from the uncertain scope of the phrase "quasi-judicial."[36] And boldly used, the doctrine of natural justice might be made to embrace a wide field of administrative activity.

[34] *Shidiack* v. *Union Government*, 1912 A.D. 642. "The question . . . is entirely subjective" (*R.* v. *Rampai*, 1957 (4) S.A. 561 (T)); "There is no room for an objective test" (*Mabe* v. *Minister of Native Affairs*, 1957 (3) S.A. 293 (T)).

[35] *Sachs* v. *Minister of Justice*, 1934 A.D. 11, *per* Stratford A.C.J. at p. 38.

[36] See *Pretoria North Town Council* v. *A. I. Electric Ice-cream Factory (Pty.) Ltd.*, 1953 (3) S.A. 1 (A.D.), at p. 11.

The cases which have admitted the "natural justice" test, turning largely on the maxim *audi alteram partem*, have figured very prominently in South African courts. Without closely defining the scope of the maxim, the courts favour its applicability whenever the statute contains nothing expressly or by necessary implication to the contrary.[37] The classic instance in South African law of implied exclusion of the rule *audi alteram partem* concerns the powers of banishment by ministerial order under the Riotous Assemblies Act.[38] In a debatable decision given in 1934,[39] the Appellate Division ruled that a provision[40] entitling the victim of the order to reasons and evidence in support of it *after* it had issued, impliedly denied him any right of hearing *before* the order had issued. The phrasing of this section has thus come to serve a grateful government as a legislative standard-form for outflanking the rule *audi alteram partem*.[41] But of course governments are not bound to be so devious, and many a statute silences the court by express prohibition of judicial review[42] or express dispensation with prior notice to the person affected.[43]

It will be appreciated that the inadequacy of judicial control of administrative decisions, even quasi-judicial ones, is accentuated in those cases where the administrative order or act is in terms of colour bar laws. To all the universal dangers of arbitrariness and bias inherent in the administrative process is added the danger of racial prejudice on the part of officials belonging to the white oligarchy and often so closely identified with the apartheid policy

[37] *R.* v. *Ngwevela*, 1954 (1) S.A. 123 (A.D.), *per* Centlivres C.J. at p. 131; *Van Wyk N.O.* v. *van der Merwe*, 1957 (1) S.A. 181 (A.D.), at p. 188. But "*necessary* implication" is now under fire and it is said that "*clear* implication will do"—see *Minister of Native Affairs* v. *Monnakgotla*, 1959 (3) S.A. 517 (A.D.), at p. 521.

[38] Act No. 27 of 1914, since substituted by Act No. 17 of 1956, ss. 2 (3) and 3 (5).

[39] *Sachs* v. *Minister of Justice*, 1934 A.D. 11, as explained in *R.* v. *Ngwevela*, 1954 (1) S.A. 123 (A.D.), at p. 132. See, too, *Mabe* v. *Minister of Native Affairs*, 1957 (3) S.A. 293 (T).

[40] Act No. 27 of 1914, s. 1 (13).

[41] *e.g.*, the Suppression of Communism Act, No. 44 of 1950, s. 9, as amended; the Native Administration Act, No. 38 of 1927, s. 5, as amended.

[42] *e.g.*, Immigrants' Regulation Act, No. 22 of 1913, s. 3 (1).

[43] *e.g.*, Native Administration Act, No. 38 of 1927, s. 5 (1) (*b*), as amended: "The Governor-General may whenever he deems it expedient in the general public interest without prior notice to any person concerned, order. . . ." See *Mabe* v. *Minister of Native Affairs*, 1957 (3) S.A. 293 (T), at p. 296.

as to make any detachment supremely difficult.[44] What has been said of judicial review in England, namely, that it lacks breadth and depth and tends to be perfunctory and ineffective, is equally applicable in South Africa. But the theoretical assumption upon which judicial self-restraint in England is said to proceed, namely, the "partly concealed policy decision—a decision that ministerial responsibility to Parliament shall be deemed by the courts to be an appropriate safeguard against the erroneous exercise of widely framed statutory powers" is of course entirely inapplicable to the conditions of an oligarchic State and therefore robs the judiciary of any such rationale for its attitude. And those democratic extra-judicial safeguards which are thought to be of the utmost importance in England for the very reason that judicial review rarely penetrates to the merits of the exercise of administrative discretion,[45] are all practically non-existent so far as the non-White in South Africa is concerned.

In some matters, the urgency with which the apartheid policy is pursued by the Government rises to such a pitch that even dilatory intervention by the courts is felt as an intolerable impediment. Indeed, the very existence of interdictal powers against officials of so autocratic a State is, in a sense, paradoxical, and expresses the incongruity between a tradition of freedom and a caste society to which reference has been made above. Vast administrative power over the individual exists side by side with a formally independent judiciary which is still able to call upon the officers of the State, from Ministers of the Crown downwards, to show cause why their orders should not be set aside.

Short of disestablishing the Supreme Court in its present form, or drastically changing its personnel,[46] the logical escape from incessant harassment of executive action by courts of law is to disarm the courts by suitable legislative provisions. This drastic remedy has been resorted to in a statute which expressly prohibits

[44] The General Council of the Bar of South Africa stressed this special danger in its plea for a right of appeal on the facts: see H. J. May, *The South African Constitution* (3rd ed., 1955), p. 334.

[45] S. A. de Smith, *Judicial Review of Administrative Action* (1959), p. 17 *et seq.*

[46] The first was tried indirectly in the ill-fated High Court of Parliament Act, No. 35 of 1952; the second method proceeds.

the issue of any interdict or other legal process staying certain orders of deportation of natives from any proclaimed area.[47] But the most comprehensive measure of this kind, the Public Safety Act,[48] invoked after the Sharpeville events of 1960, enables the Government, by proclaiming a state of emergency, to rule by decree with virtually unlimited power. There is no power in the courts to question the existence of such emergency or the necessity of acts done in pursuance of it.[49] In this measure and, in a more limited field, in the Prohibition of Interdicts Act, the growth of executive power which has characterised the apartheid policy culminates in the reduction of the judiciary to complete impotence. We reach the point where law merges into administrative discretion.

The Constitutional Crisis

Much of the interplay between executive, legislature and judiciary which we have been examining, though profoundly important in legal, constitutional and political terms, unfolds sporadically and is revealed, in retrospect, as a process of denudation of basic rights and the steady elaboration of differential statuses. In this process, the occasional strongpoints doggedly held by the courts are systematically reduced by legislation. This interplay between courts and Parliament is most dramatically portrayed in the story of the disfranchisement of the Cape Coloured voters.[50] No episode in South African legal history better portrays both the hitherto robust independence of the judiciary and the doctrinal limitations by which it fetters itself.

The extraordinary series of decisions which marked this constitutional battle arose out of the measures taken by the Government

[47] The Natives (Prohibition of Interdict) Act, No. 64 of 1956, s. 2.

[48] Act No. 3 of 1953.

[49] "If in the opinion of the Governor-General it at any time appears . . ." (s. 2—with some limited exceptions: see s. 3 (3)). Further "the Governor-General may . . . make such regulations as may appear to him to be necessary or expedient . . ." (s. 3 (1)). One such regulation (s. 29) specifically withdraws from courts of law any competence to entertain matters arising out of the regulations: Proclamation No. 167, *Extraordinary Government Gazette*, May 17, 1960. See *Stanton* v. *Minister of Justice*, 1960 (3) S.A. 353 (T); *R.* v. *Maphumule*, 1960 (3) S.A. 793 (N).

[50] For a full account, see Hahlo and Kahn, *op. cit.*, note 14, above, p. 152 *et seq.*; *Annual Survey of South African Law* (1956), p. 1; Keeton, 6 *Current Legal Problems* (1953), p. 32.

to implement its apartheid policy in the political field. At the time of the accession to power of the Nationalist Government in 1948, little enough remained to be done: the Act of Union itself and the Representation of Natives Act, No. 12 of 1936, had long since substantially disfranchised the great majority of the non-White population, leaving the coloured male population of the Cape as the sole non-European group still in possession of full voting rights, the sole survivors of the old Cape political liberalism.[51] These, then, were the target of the disfranchisement Bill of the year 1951. The Government purported to enact this Bill by a simple majority of the two Houses of the Union Parliament each voting separately in the manner prescribed for all normal legislation.[52] In doing so, the Government flouted the special voting procedure (which called for a two-thirds majority at a joint sitting of the two Houses) prescribed by the South Africa Act for the purpose of entrenching the Cape franchise rights as at the time of Union.[53]

The Union Government, supported by a decision of the Appellate Division [54] and by an impressive body of legal opinion,[55] took its stand on the absolute sovereignty of the Union Parliament and confidently repudiated the power of the courts to question the validity of any Act of Parliament whatsoever. But the Appellate Division, to the dismay of the Government, affirmed its "testing right," and unanimously condemned the Act as unconstitutional, reversing its own prior decision in the process.[56] This flat confrontation of executive will by judicial independence provoked an angry storm of abuse in the House of Assembly. The Government returned to the charge with the High Court of Parliament Act of 1952,[57] which involved a grotesque masquerade of Parliament itself as the final court of constitutional appeal. This, too, was declared void by the Appellate Division.

[51] Which was in any event a good deal less liberal than is usually thought; see Roskam, *op. cit.*, note 6, above, p. 83.
[52] Separate Representation of Voters Act, No. 46 of 1951.
[53] The South Africa Act, ss. 35 and 152.
[54] *Ndlwana* v. *Hofmeyr. N.O.*, 1937 A.D. 329.
[55] See McWhinney, *op. cit.*, note 15, above, p. 99, note 9.
[56] *Harris* v. *Minister of the Interior*, 1952 (2) S.A. 428 (A.D.).
[57] Act No. 35 of 1952, which was declared invalid in *Minister of the Interior* v. *Harris*, 1952 (4) S.A. 769 (A.D.).

For the moment the drama was suspended, the conflict unresolved, the atmosphere saturated with political tension. Yet the denouement was at hand. And it was in the constitution of the Senate that the Government finally found the Achilles' heel which it sought. In form at least, no more than a simple majority in each of the two Houses sitting separately was needed to reconstitute the Senate,[58] and to augment its numbers with enough assured supporters of Government policy to enable the contentious measure to be passed in a manner complying with the entrenched provisions. The Senate was therefore suitably enlarged,[59] and in due course, with the aid of this packed Senate, a uni-cameral session of the Union Houses of Parliament validated the disfranchisement Bill with the requisite two-thirds majority.[60]

When this Act came, in its turn, to be challenged before the Appellate Division, counsel for the disfranchised voters urged that, for the purposes of the entrenched provisions of the constitution, the new Senate was as fraudulent as a senate as the High Court of Parliament was fraudulent as a court.[61] Save, however, for one distinguished but solitary dissentient,[62] the court on this occasion refused to probe behind the formal correctness of the parliamentary proceedings, or impugn them because of their admitted purpose to circumvent the entrenched clauses of the constitution. "The legislative scheme which was adopted is not open to attack in law," said Centlivres C.J., concluding his judgment for the majority of the court; "each step taken in this scheme was taken in accordance with the provisions of the South Africa Act. . . ."[63]

The disfranchisement of the Coloured voters was now a jural fact, and the Government's franchise policy had been consummated. The explanation of the collapse of the judicial resistance at this point is puzzling. In the last resort, the formal reasoning of the

[58] South Africa Act, s. 25: "Parliament may provide for the manner in which the Senate shall be constituted. . . ."

[59] Senate Act, No. 53 of 1955.

[60] South Africa Act Amendment Act, No. 9 of 1956. The Act jettisoned the entrenchment of voting rights contained in s. 35 of the South Africa Act.

[61] Counsel argued that "the Senate so constituted is a 'packed' Senate and not a 'House' [of Parliament] within the meaning of the provisos to sections 35 and 152 [of the South Africa Act]": see *Collins* v. *Minister of the Interior*, 1957 (1) S.A. 552 (A.D.), at p. 555.

[62] Schreiner J.A.

[63] At p. 570.

judgments is not severable from underlying changes in judicial sentiment, responding, perhaps, to new social and political pressures, and catalysed by the dilution of the Appellate Bench itself.[64] At all events, in this, as in every instance of judicial impediment to Government policy, the Government's command of a parliamentary majority was finally decisive.

Higher and Lower Courts

Proper recognition of the role of the Supreme Court in arresting or at least mitigating the apartheid policy must have regard for the adverse climate of opinion in which the court functions and for

> "the technical consideration that the South African constitution (apart from the entrenched clauses) is lacking in any Bill of Rights upon which courts of law might rely to implement their policy preferences. . . ." [65]

But allowing this, it is essential to restore the perspective. The effective area of control which has engaged our attention is but a fragment of the total field of operation of the courts. In the large majority of cases, there is no room for judicial review, either direct or covert, no question of constitutional irregularity, no interpretative latitude. In such cases, the bias of the court (where it exists) in favour of civil rights can express itself only in the determination of facts and the imposition of sentence. As to the law, there is nothing left but to apply it. The judiciary, imprisoned within the confines of a legal order which is indissolubly wedded to race discrimination, is forced into complicity with laws which sanctify inequality as a principle. It is reduced to the scrupulous dispensation of injustice.[66]

It is essential to remember that some half a million persons are convicted annually for offences against apartheid laws, especially pass and liquor laws.[67] And the lower courts, who are mainly

[64] The Appellate Division Quorum Act, No. 27 of 1955, had raised the quorum from four to eleven judges in any appeal in which the validity of an Act was in question. See, now, Act No. 59 of 1959.

[65] McWhinney, *op. cit.*, note 15, above, p. 122; see also p. 102.

[66] The conundrum whether applying "unjust" laws in a "just" way is a moral process the writer leaves to others; see Stoljar, "More Thinking on Laws and Morals," above, p. 140, at p. 156.

[67] In 1959, 1,066,140 Africans were convicted of "non-serious crimes" (see *South African Monthly Bulletin of Statistics* (December 1960), of which approximately

concerned, are, with some exceptions, not troubled by nice considerations about racial equality or the anxious concern for civil liberties which has hitherto characterised the Supreme Court. The role of the lower courts in implementing apartheid laws, whilst devoid of technical legal interest, is of immense practical significance in its impact on the African people. The vast number of prosecutions entail for the accused mystifying rules, inadequate interpretation and perfunctory trials [68] which engender in them moods of helplessness, resignation and resentment which bring the whole of the law into contempt. To the African people it is this which is "the law," and no amount of solemn or learned disquisition will succeed in dissociating the courts as a whole from their ignoble role of enforcing discriminatory and oppressive laws.

As for the Supreme Court, it is necessary to remember that a court is neither less nor greater than its judges and it would be unrealistic to disregard the changing composition of the Supreme Court of South Africa in recent years. It is perhaps inevitable that a government imbued with an almost religious determination to implement apartheid, impatient of judicial obstruction and mistrustful of the established judiciary, should seek to instal in office men whom it feels to be closer to it in sympathies. It is fair to say that the abnormal character of a great many judicial appointments did not in every case produce the spectacular results which may have been looked for by those who underestimate the strength and persistence of the tradition of the law. Yet in the end one must expect to find a growing community of sentiment between executive and judiciary which will be less favourable to the limited kind of judicial control of autocracy to which the higher courts have been prone.

Positivism—I: Parliamentary Sovereignty

In this account of the creeping advance of absolutism, the inadequacy of common law doctrines as defensive weapons is starkly

one-third concern pass laws. See, too, *The Pass Laws* (South Africa Institute of Race Relations, 1960), p. 26.

[68] See N. V. Franklin, "Natives and the Administration of Justice," reprinted from the *South African Outlook* (1936).

revealed. For this is not a case, as in Nazi Germany, of a judiciary which is coerced from without; nor yet entirely of men swamped from within by colleagues of a new and less tolerant persuasion. We are concerned here with a judiciary which is inviolate and still imbued with the egalitarian outlook of the common law. How is it that a court so constituted and so oriented proves powerless to withstand the advance of despotic power and to protect fundamental civil rights?

The nature of the South African State and the fundamental postulates of its caste structure are, of course, the paramount reason. The ultimate subordination of the judiciary to the legislature ensures that these postulates shall be observed. Linked to these are psychological and juridical factors. Of the social and psychological sub-stratum of the judicial process in a caste society something has been said above. The complementary juridical basis lies in what McWhinney calls the "incurable positivism" of the judges. The doctrine of parliamentary sovereignty is accepted by the South African courts in all its uncompromising rigour. "Parliament," we are told, "may make any encroachment it pleases upon the life, liberty or property of any individual subject to its sway."[69] It follows that Acts of Parliament are beyond the review of courts of law and no limit is set to the omnipotence of the legislature save what can be found in the constitution itself to which Parliament owes its being. Thus, the testing right asserted by the Appellate Division in the Coloured vote cases could only be founded upon the special "entrenched" provisions of the Act of Union.[70]

It is possible that fundamental rights may be so entrenched in a written constitution that they are not at the mercy of a parliamentary majority. Certainly the utter failure of the Act of Union to accomplish this was made plain by the fate of the Coloured vote. But aside from constitutional entrenchments, the abjuration of all power of review by the judges finally disarms the Supreme Court.

> "If the assent of the Crown is once given and the statute duly promulgated, there remains no room for the interference

[69] *Sachs* v. *Minister of Justice*, 1934 A.D. 11.
[70] *Minister of the Interior* v. *Harris*, 1952 (4) S.A. 769 (A.D.), *per* Centlivres C.J., at p. 779.

> of the courts on the ground that there has been a disregard or a violation of what are called ' fundamental principles,' "

said Innes C.J.,[71] fifty years ago, expressing a point of view which can be matched in comparable terms throughout the common law world.

Conceivably this point of view is politically and morally defensible in a political democracy in which the law-makers may be called to account by the people as a whole. In a democratic order positivism of this kind may conceal an acceptable moral basis of its own, justifying the rule of fidelity to law. For " the absolute sovereignty of the majority " [72] carries with it some assurance, however precarious, of legislative responsiveness to elementary popular demands. But what principle of justice requires that the sovereignty of a minority be exempt from judicial scrutiny, from the need to conform with elementary principles of fairness, superior to the law-maker? How, morally speaking, shall one defend positivism in a caste society, an oligarchy, in which the disfranchised classes can neither change the law nor recall the law-maker, but must turn to the courts for protection and refuge? Is not the whole theory of positivism and of fidelity to law untenable as an ethical postulate in an undemocratic State if judges believe with heart and conscience that their duty is to administer not merely law, but just law? In South Africa the law is at the mercy of a minority and the racial laws of the South African Government pour in through an open portal. Here is to be seen in the life of a contemporary State how the apparent " neutrality " of judicial positivism in practice condones the norms of the existing social order.

In the social relations of the people of South Africa, especially their caste relations, is to be found the key to the legal order and to the limits of the judicial function. The basic pattern of apartheid law is unalterable without a fundamental change in these relationships, in fact the dissolution of the caste system. So long as it exists and is maintained by the dominant group, the judges are helplessly

[71] *R.* v. *McChlery*, 1912 A.D. 199.
[72] De Tocqueville, *Democracy in America* (transl. Henry Reeve, 1946), Chap. XIV. But part of his theme is the danger of tyranny by majorities.

pinned within the resultant legal framework. Within this framework there is a "rule of law" in South Africa, but it is law of a kind which brings small comfort to the majority of its citizens, demonstrating the deceptive nuances of Dicey's famous phrase, as well as its inadequacy as a constitutional or legal ideal. And even the narrow criteria of Dicey's definition of the rule of law make heavy weather in South Africa [73]; more particularly, "the absolute supremacy of the law" proudly proclaimed by the courts [74] approximates ever more closely to the absolute supremacy of the executive; and the rule that "none can be punished save by a properly constituted legal tribunal" is riddled by exceptions and utterly overborne by such legislation as the Public Safety Act of 1953.

The expression "rule of law," however, has recently acquired a wider meaning through the activities of the International Commission of Jurists, whose latest formulation [75] recognises it no longer as an absolute, but as a dynamic, concept in which, to the safeguards of civil and political rights of the individual is now added the establishment of "social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised." This involves a great shift of emphasis, acknowledging that the conditions essential to the operation of the rule of law "are subject to the *paramount condition* that the law must be just." [76]

The problem is to translate this "paramount condition" into social reality. Verbal declarations of this character, if not accompanied by the creation and legal protection of social institutions capable of giving effect to them, may remain as pretentious and as futile as those solemn paper declarations of the rights of man with which the world has become somewhat disenchanted.[77] Looked at

[73] Brookes and Macaulay, *op. cit.*, note 9, above, Chap. II; Hahlo and Kahn, *op. cit.*, note 9, above, p. 133.

[74] *e.g.*, *Krohn* v. *Minister of Defence*, 1915 A.D. 191, *per* Innes C.J., at p. 196.

[75] "The Declaration of Delhi" (II (1) *Journal of the International Commission of Jurists* (1959), p. 7). See, too, J. T. Thorson, "A New Concept of the Rule of Law," Can.B.Rev. (1960), p. 238.

[76] Thorson, *ibid.* p. 247.

[77] The absence of any elaboration of this concept or examination of its implications was a conspicuous weakness of the proceedings of the Congress at New Delhi. Jurists who accept the broadening of the rule of law so as to include the establishment of social justice have now to lift this concept above the level of an abstraction. The protecting walls of legal positivism are behind them and they

concretely in terms of the actual structure of the South African State and the most pressing needs of its non-White citizens, the "rule of law," to rise above the level of an abstraction, must not only erase the existing differentiation in civil rights in so far as it rests on colour factors, but incorporate such rules as will terminate the power of the economically dominant section to perpetuate the condition of dependence, ignorance and poverty in which the non-European people as a whole languish. The mere statement of this purpose is immediately sufficient to reveal the socio-economic problems which await solution. It is not surprising that, measured in these new terms, the application of the principle of apartheid was found by the International Commission of Jurists to be utterly incompatible with the rule of law, violating almost article by article the Universal Declaration of Human Rights which was adopted by the General Assembly of the United Nations in 1948.[78]

Positivism—II: Law and Non-Law

The stark injustice and inequality recognised or instituted by South African law, combined with the oligarchic structure of the State, lead inexorably to the question whether these iniquitous laws are laws at all. Here we are confronted once again by the perennial dispute between positivist and natural law theory, which has revived so vigorously in recent years. It would be rash to enter the lists which such distinguished contestants as Professors Hart and Fuller have so recently vacated,[79] but some reference to one aspect of this controversy in the light of a contemporary system of law may be admissible.

The formidable logical strength of the positivist position is, of course, beyond question. Yet it is true that even so adamant a positivist as Radbruch found himself driven by the barbarities of the Nazi régime to make the reservation that the incompatibility of positive law and justice may "reach such an intolerable degree

are now squarely in the realm of the political and economic controversies of our age.

[78] *South Africa and the Rule of Law* (Int.Com. of Jurists, 1960).

[79] H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 Harv. L.R. (1958), p. 593; Lon L. Fuller, "Positivism and Fidelity to Law," *ibid.* p. 630.

that law becomes ' non-law ' and has to yield to (the postulate of) justice." [80] What " yielding to the postulate of justice " means in practice is not easy to determine. Certainly in South Africa, as in Nazi Germany, the matter ceases to be academic, and it becomes at least possible to argue that in South Africa, too, the incompatibility of positive law and justice has reached such an intolerable degree that law becomes non-law. But shall we, in describing it as such, have done anything more than re-name pejoratively an empirical social process, passing upon it a judgment of moral censure. There is a grave danger here of falling into a barren verbal disputation in which each protagonist vainly seeks to affirm an exclusive " true " meaning to law.

Consider, for instance, the direct challenge to the validity of the law which was implicit in the refusal of some of those accused of participation in the passive defiance of pass laws, to plead to the charges brought against them. The refusal was couched in these terms:

> " We, the accused, members of the African community, refuse to plead to the charge laid against us because we are under no obligation to obey a law which has been imposed on the African people without their consent. We deny this court the right to sit in judgment of this case because it is constituted by members of the South African white community who have arrogated to themselves the exclusive right, which we dispute, of deciding for or against us in this country." [81]

This is in substance the repudiation of positivism in the conditions of a caste society, on the grounds that the ultimate basis of positive law is the consent of the governed. To put it another way, behind the rejection of the pass laws as binding is the rejection of the Kelsenian basic norm—the meta-legal hypothesis underlying the legal order—that the constitution shall be obeyed. For the African people—so the argument runs—since they had no part in settling the constitution of the Union, this hypothesis is invalid and the hierarchy of norms constructed upon it therefore falls to the ground.

[80] As quoted by H. O. Pappe, 23 M.L.R. (1960), p. 261.
[81] See the report in *The Times*, April 6, 1960.

But we are treading no new ground. A hierarchy of norms, a legal order, does not fall to the ground under the weight of its own wickedness. It does not spontaneously "yield to the postulate of justice." As long as the law-maker retains the will and power to impose it, the obligation to obey, or at least the consequences of disobedience, are physically inescapable. The evidence of this is daily to be seen in the South African courts. Thus, the challenge of the accused did not serve to avert their conviction and imprisonment. Call it "law" or "non-law," all that is certain is that the magisterial order, backed by the coercive power of the South African State, prevails. In the background is the mocking echo of Thrasymachus: "Justice is nothing else than that which is advantageous to the stronger." [82]

It would seem fruitless, therefore, to withhold the term "law" from the rules which in South Africa are enacted by the legislature, effectuated by the executive and enforced by the courts with the full coercive sanction of the State. If we do insist in withholding the term "law" from these processes, we shall have altered nothing in regard to their efficacy in the regulation of social conduct, their operation in the real world of courts, police and jails, and afforded no solace to their victims. "Law surely is not the gunman situation writ large," says Hart, recoiling from the hideous logic of the Austinian command.[83] To the Africans standing before the sten-guns at Sharpeville and in Pondoland the difference will not be so readily apparent. It would seem preferable to concede that law is a complex social phenomenon, one aspect of which is concerned with power; and that in a caste society group antagonism and conflict so overshadow common interests that law reveals itself predominantly (not exclusively) as an exercise of power.[84]

There is, indeed, an unbridgeable gulf between the kind of legal order represented by apartheid and the spirit and content of a system of law which would harmonise with contemporary ideas of social justice. The judge in South Africa who cannot reconcile himself morally to apartheid laws becomes, in spite of himself, a

[82] Plato, *The Republic* (Lindsay's transl., 1948), Bk. I, p. 14.
[83] Hart, *loc. cit.*, note 79, above, p. 603.
[84] *Cf.* G. Schwarzenberger, "The Three Types of Law," 2 *Current Legal Problems* (1949), p. 103.

vehicle of those laws. For the enforcement of the laws enacted in any social order is a necessity of that social order and so long as those in power remain so, they must in one way or another maintain or create a judiciary which will uphold their laws. This is a rule of self-preservation. And the judge, dedicated to uphold the principle of justice, becomes its executioner.

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